EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 2039

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Plaintiff in Error,

vs.

EMIL R. SCHOEFFLER,

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error from the United States Circuit Court for the Western District of Washington, Western Division

PIONEER B'DY. & P'TG. CO., TACOMA—65066

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STIPULATION.

It is hereby stipulated by the parties hereto, that the Clerk of the Circuit Court of Appeals shall print the following parts, only of the record which are deemed material to the hearing of the writ of error in this case, to-wit:

Complaint;

Answer to Complaint;

Reply to Answer;

Judgment;

Assignments of Errors;

Bill of exceptions;

Order Settling Bill of Exceptions; and this stipulation;

Petition for Writ of Error;

Order Allowing Writ of Error;

Bond on Writ of Error;

Order Extending Time;

Citation and Writ of Error;

That in printing the above portions of the record, the designation of the Court, title of the case, verifi-

cations and endorsements, may be omitted, except on the first page.

GEO. T. REID,
J. W. QUICK,
L. B. DaPONTE,
Attorneys for Plaintiff in Error.

RAY & DENNIS,
Attorneys for Defendant in Error.

In the Circuit Court of Appeals for the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Plaintiff in Error,

vs.

EMIL R. SCHOEFFLER,

Defendant in Error.

Complaint

Comes now the plaintiff and for cause of action against the defendant herein complains and alleges as follows:

I.

That the plaintiff is a resident of the County of Pierce, State of Washington.

II.

That the defendant is a corporation, organized and existing under and by virtue of the laws of the State of Washington, owning and operating a railway operated by steam through the said County of Pierce, State of Washington, and has a principal place of business in the City of Tacoma, County of Pierce, State of Washington.

III.

That there are located in said City of Tacoma, certain repair shops belonging to the said defendant,

and connected therewith are sheds and tracks upon which cars are brought in for repairs.

IV.

That plaintiff was, on or about the 21st day of July, A. D. 1909, and for some period of time previous to said 21st day of July, A. D. 1909, employed by the defendant corporation to work on the repair of such cars as needed repairs, in and about the premises within the City of Tacoma, furnished by the corporation defendant for that purpose.

V.

That part of these premises consists of a number of tracks running away from the main line by means of switches, in a southwesterly direction and then parallel to said main line. That part of these parallel tracks are within and under a long shed to the south and part are in the open and outside of said shed to the north thereof, where they leave the main line, said tracks are used by the said defendant corporation exclusively for the repair of cars.

VI.

That on the said 21st day of July, A. D. 1909, at about 1 o'clock in the afternoon, the plaintiff was instructed by the foreman in charge of the work to repair a certain car lying on one of the repair tracks just outside of the shed commonly known to the men in the repair shops as track numbered Five. That at about 5 p. m. of the same day, while he was repairing the said car together with one Turner, it became necessary for plaintiff to secure a jack screw in order to properly repair the said car. That is the custom-

ary and regular procedure to leave jacks, after getting through with them, anywhere beside the tracks where the repair work is going on; and the plaintiff looked around for a jack and could see none, but remembered having seen one a short time before lying about 40 or 50 feet away across the track known as track number 4 to the east of said track and to the south of where he was working.

VII.

That for the purpose of securing the said jack, and in the regular course of his employment, it was necessary that plaintiff cross track numbered 4, and he accordingly did so or started to do so, walking to the south in front of three empty cars on said track numbered 4. That is he did so, the said three cars were run into by other cars on the same *tract* to the north, and the force of the momentum caused the three cars on the track where plaintiff was crossing to move and strike plaintiff, and threw plaintiff to the ground, injuring him severely.

VIII.

That it is the regular procedure on these tracks known as Repair tracks to bring cars on the track, and when the track is full or fairly full of cars to lock the switch, and leave the said cars so spotted, as it is called, on the track, and not to move any of said cars until the cars are fully repaired. That the regular procedure and only safe and proper procedure, and the procedure adopted by the defendant, and known to the plaintiff and relied upon by him, is that when once the track is so "spotted" with cars, that the said track or switch shall not be opened nor

the cars moved until all the cars on said track are repaired, at which time a switchman comes down the track, and *waives* a signal warning the repair man that these cars are to be pulled out.

VIIII.

That no such signal had been given that the said cars that struck plaintiff had been repaired, and said cars had not been repaired, and it was well known to plaintiff and to the foreman in charge of the yard that said cars had not been repaired, and it was well known to the switchmen that said cars had not been repaired, and it was unsafe to move any of the said cars unless the signal was given to men engaged in the repair of cars. That there were on said track numbered 4 a large string of cars ready for repairs. That said cars were separated from one another, and were stationary, and there was no engine attached to said cars, and the cars had been stationary, and the track spotted for the greater part of the afternoon. That when cars are spotted, under the regular procedure, which was known to the plaintiff and to the switchmen and the foreman in charge of the cars, it was perfectly safe for plaintiff to cross and recross the said track, and it was the customary, ordinary and necessary way for him to travel when working around the cars.

X.

That knowing that plaintiff and other workmen were engaged in repairing cars, and passing back and forth over the said track 4 in the regular course of their employment, and wholly without regard for his safety, or for the safety of the other repair men,

the foreman instructed one of the switchmen to open said track 4, and said switchman did so, and without any regard to the safety of the plaintiff or other repair men in and around the said repair tracks, and contrary to the general custom and ordinary and only safe procedure in the premises, wholly without warning to plaintiff and without any regard to his duty toward plaintiff, in a careless, negligent and reckless manner drove the cars at the end of the track down the track at so fast a rate of speed that they bumped into the cars in front of the plaintiff, and threw him to the ground and ran over him.

XI.

That the said switchman and switch engineer were employees and agents of the defendant and the switch engine was distant from the plaintiff about four hundred feet to the north and east and plaintiff could not, from the place where he was working, see that the cars had started to move at the other or north end, and did not see that they had done so, and relied upon the general rule in force in said regard and about the said tracks.

XII.

That because of the negligence of the defendant, its foreman and switchman as aforesaid, plaintiff while in the exercise of his employment was injured. That the injuries sustained by him on account of said negligence of defendant its servants and agents as aforesaid; are as follows: severe fracture of the left fore-arm, necessitating hospital and medical attendance for a period of over six months, and necessitating the removal of a number of the bones

of said arm, and rendering the arm absolutely useless, ear cut and hearing impaired because of the shock and the injury received, right cheek cut open, head cut open, necessitating seven stitches, right hip injured, and severe injury to the back. That said injuries are permanent, and the earning capacity of the plaintiff is because of the same impaired and plaintiff has not been able to follow his usual employment ever since. That the said injuries have caused the plaintiff to suffer and plaintiff has been in great pain, and now suffers because of the said injuries and will continue to so suffer.

XIII.

That plaintiff was, at the time of the injuries complained of, a mechanic capable and at the time earning $2.40 per day, and because of said injuries, the plaintiff has lost in wages since the day he was hurt, the sum of Four hundred Dollars.

That plaintiff has suffered pain and suffering as aforesaid, is a laboring man and without the use of his said arm he cannot follow his usual occupation and is unable to follow any other and by his injuries which are permanent, will be unable to ever follow his regular occupation or any other and by the pain and suffering and the impaired earning power the plaintiff has been damaged in the sum of Fifteen Thousand Dollars.

WHEREFORE, the plaintiff prays that judgment issue against the defendant in the sum of Fifteen Thousand and Four Hundred Dollars, and for his costs and disbursements herein.

RAY & DENNIS,
Attorneys for the Plaintiff,
526-7 California Bldg., Tacoma, Washington.

STATE OF WASHINGTON, COUNTY OF PIERCE.—ss.

EMIL R. SCHOEFFLER, being first duly sworn, on oath deposes and says that he is the plaintiff in the foregoing action, that he has read the foregoing complaint, knows the contents thereof, and that the statements therein contained are true, as he verily believes.

EMIL R. SCHOEFFLER.

Subscribed and sworn to before me this 1st day of February, A. D. 1910.

THOMAS F. RAY,

Notary Public in and for the State of Washington, residing in Tacoma, in said County.

(Endorsed):

"FILED

U. S. CIRCUIT COURT,

Western District of Washington,

MAR. 3, 1911.

SAM'L D. BRIDGES, Clerk."

Answer

Comes now the defendant and for answer to the complaint of the plaintiff alleges as follows:

I.

For answer to paragraph I, defendant admits the allegations therein contained.

II.

For answer to paragraph II, defendant admits the allegations therein contained.

III.

For answer to paragraph III, defendant admits the allegations therein contained.

IV.

For answer to paragraph IV, defendant admits the allegations therein contained.

V.

For answer to paragraph V, defendant admits the allegations therein contained, save and except the allegation that said tracks are used by the defendant corporation exclusively for the repair of cars, which allegation this defendant denies.

VI.

For answer to paragraph VI, defendant admits the allegations therein contained.

VII.

For answer to paragraph VII, defendant admits the allegations therein contained.

VIII.

For answer to paragraph VIII, defendant denies each and every material allegation therein contained.

IX.

For answer to paragraph IX, defendant denies each and every material allegation therein contained.

X.

For answer to paragraph X, defendant denies each and every material allegation therein contained.

XI.

For answer to paragraph XI, defendant denies each and every material allegation therein contained.

XII.

For answer to paragraph XII, defendant admits that plaintiff received certain injuries, the nature and extent of which are unknown to this defendant, and further answering said paragraph denies each and every material allegation therein contained.

XIII.

For answer to paragraph XIII, defendant alleges that it has no knowledge or information concerning the sum of money plaintiff has lost in wages since his said injury, and further answering said paragraph denies that plaintiff has been damaged in the sum of Fifteen Thousand Dollars ($15,000.00) as therein alleged.

Defendant further answering said complaint and as an affirmative defense thereto, alleges:

I.

That plaintiff on the 21st day of July, 1909, and for a long time prior thereto had been engaged as a car repairer in the employ of defendant at its yards and shops at South Tacoma, Pierce County, Washington, and was familiar with the manner and custom of handling cars in said yard, and that the dangers incident to his employment were open and plainly visible and fully known and understood by said plaintiff, and were fully assumed by him as a part of his said employment and plaintiff had full knowledge that it was the custom and was necessary

for cars to be frequently moved along the tracks where he was working, and that it was his duty to keep a constant and careful lookout for such cars.

II.

Defendant for a second and further affirmitive defense alleges that the injury which plaintiff received was caused by the carelessness and negligence of said plaintiff in voluntarily passing in front of the cars at a time when the same were about to be moved, without exercising ordinary care and caution for his own protection, and that the negligence of the plaintiff was the cause of and contributed to his said injury.

III.

For a further and third affirmative defense, defendant alleges that if plaintiff was injured through the carelessness or negligence of any person other than himself, said injury was caused by the carelessness and negligence of the fellow servants and co-employes of said plaintiff, for whose acts and omissions this defendant is not liable.

WHEREFORE, defendant prays that said action be dismissed and that it recover its costs and disbursements herein expended.

GEO. T. REID and
J. W. QUICK,
Attorneys for Defendant.

STATE OF WASHINGTON, COUNTY OF PIERCE.—ss.

J. W. QUICK, being first duly sworn, says: That he is one of the attorneys for the defendant in the above entitled action; that the same is a foreign corporation and that he makes this verification for and

in its behalf, being authorized so to do; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

J. W. QUICK.

Subscribed and sworn to before me this 4th day of March, 1910.

F. M. HARSHBERGER,
Notary Public in and for the State of Washington, residing at Tacoma.

(Endorsed):

"Received a copy of the foregoing answer this 5th day of March, 1910.

RAY & DENNIS,
Attorneys for Plaintiff."

"FILED
U. S. CIRCUIT COURT,
Western District of Washington,
MAR. 7, 1910.
A. REEVES AYRES, Clerk,
SAM'L D. BRIDGES, Deputy."

Reply

Comes now the plaintiff and in reply to the Affirmative defense set up in the Answer of the defendant, alleges, denies and admits as follows:

He denies each and every allegation contained in said affirmative defense.

RAY & DENNIS,
Attorney for the Plaintiff,
526-7 California Bldg., Tacoma, Washington.

STATE OF WASHINGTON, COUNTY OF PIERCE.—ss.

EMIL R. SCHOEFFLER, being first duly sworn on oath deposes and says that he is the plaintiff in the foregoing action, that he has read the foregoing reply, knows the contents thereof, and that the statements therein contained are true, as he verily believes.

EMIL R. SCHOEFFLER.

Subscribed and sworn to before me this 12th day of March, A. D. 1910.

J. CHARLES DENNIS,
Notary Public in and for the State of Washington, residing in Tacoma, in said County.

(Endorsed):

"Mar. 12, 1909,
Receipt of the within is hereby acknowledged.
GEO. T. REID,
J. W. QUICK,
Attorneys for Defendant."

"FILED
U. S. CIRCUIT COURT,
Western District of Washington,
MAR. 3, 1911.
SAM'L D. BRIDGES, Clerk."

Judgment

This cause having come on regularly for trial on the Fourteenth day of March, A. D. 1911, and a jury duly empanelled to try the same, and the plaintiff appearing in person and by his attorneys, Messrs. Ray & Dennis, and the defendant appearing by his

attorney, J. W. Quick, Esq., and the trial of said cause having been completed on the Fourteenth day of March, A. D. 1911, and the Court having instructed the jury, and the jury on said day having brought in their verdict in said cause in writing, in words and figures as follows:

"We, the jury empanelled in the above entitled case, find for the plaintiff and assess his damages at the sum of Forty-five Hundred Dollars ($4500.00)

E. J. WALSH, Foreman."

Now, on this 16th day of March, A. D. 1911, upon the application of plaintiff, by his attorneys, for judgment on said verdict, it is by the Court,

Ordered, Adjudged and Decreed that the plaintiff, Emil R. Schoeffler, do have and recover of and from the defendant, Northern Pacific Railway Company a corporation, the sum of Forty-five Hundred ($4500.00) Dollars, together with his costs and disbursements in this action to be hereafter taxed.

Dated this 16th day of March, A. D. 1911.

GEORGE DONWORTH,

Judge of said Court.

Filed March ...., 1911.

(Endorsed):

"FILED

U. S. CIRCUIT COURT,

Western District of Washington,

MAR. 16, 1911.

SAM'L D. BRIDGES, Clerk."

"J. & D. 181."

Order Extending Time

Now on this 22nd day of May, 1911, on application of the defendant and for good cause shown, the time for making, serving and filing a bill of exceptions in the above entitled cause is hereby extended until and including June 5, 1911.

GEORGE DONWORTH,
Judge.

(Endorsed):

"FILED
U. S. CIRCUIT COURT,
Western District of Washington,
MAY 22, 1911.
SAM'L D. BRIDGES, Clerk."
"G. O. B. 225."

Bill of Exceptions

BE IT REMEMBERED that on this the 14th day of March, A. D. 1911, the above entitled cause came on for trial in the above named Court before the Honorable George Donworth, judge presiding, and a jury.

The plaintiff appearing and being represented by his attorneys and counsel Messrs. Ray & Dennis, and

The defendant appearing and being represented by its attorneys and counsel Geo. T. Reid and J. W. Quick.

Thereupon the following proceedings were had and done and testimony taken, to-wit:

EMIL R. SCHOEFFLER, Plaintiff herein, being called on his own behalf and duly sworn testified as follows:

(Testimony of Emil R. Schoeffler, for Plaintiff)

DIRECT EXAMINATION.

(By Mr. DENNIS):

I reside at South Tacoma, Washington, and I commenced working for the Northern Pacific Railway Company on the 3rd day of October, 1908, as a car repairer in its yards at South Tacoma and received $2.40 a day.

At the car shops at South Tacoma there are certain tracks used exclusively for the repairing of cars. These tracks are designated by number, being from 1 to 6 inclusive. Tracks 1 and 2 are used for light repairing, and tracks 3, 4, 5 and 6 for heavy repairing, that is cars which are only slightly damaged and require only light work to repair them are placed on tracks 1 and 2. The cars which are badly damaged and require heavy repairs are placed on tracks 3, 4, 5 and 6 which run under a long shed.

These tracks are connected with or torn off from what is known as the housetrack or lead, and the switches are locked and the shop foreman and his assistant, who have charge of the repair work, carry the keys to these locks. The foreman was Mr. Henry Reese and the assistant foreman was Mr. Fred Haas.

On the morning of July 21, 1909, I was working on track No. 3 until noon and in the afternoon I went to work on track No. 5. There was no moving of cars on tracks 4 or 5 in the afternoon before the accident to me, which occurred about 5 o'clock.

At the time of the accident there were about four-

teen cars standing on track No. 4 and these cars were separated, or spotted as we call it. There were two cars and then an opening, and then three and another opening, and then two more and then three more and an opening, and then two more. There were four openings and these openings had been there all the day and when cars are separated in this way we call the track "spotted" and there is no danger in crossing the track for the reason that the switch is locked. Whenever a track is spotted the switch is locked by the car foreman or his assistant and the engine cannot come in on the track until the foreman or his assistant unlocks the switch. When they get ready to take the cars off of a track, the foreman or his assistant comes down and unlocks the switch. The first thing is that the foreman notifies the switchman that the track is ready to pull. Then the switchman comes up and looks at the couplers to see if they are open, then he will give the signal for the other switchmen to come in and they will come in and a man on each side shows signals for the boys to keep away. At first the foreman notifies the boys to stay away; that is the first thing before the switchmen come in. Then the switchmen come in and a man is on each side to couple up the cars.

Q. Does that signal give you any idea as to the switch or danger of the track?

A. Yes.

Q. What do you know when the signal is given to you in regard to the dangerous condition, if any?

A. To stay off the switch track; that they are switching in there.

(Testimony of Emil R. Schoeffler.)

The foreman generally unlocks the switch to let the switch engine in after he gives the signal to the car repairers. After the signal is given we stay off the switch track that is being pulled.

On the afternoon of July 21, 1909, I was working on track No. 5 about 100 feet from the switch and about 400 feet from the switch of track No. 4, and about five o'clock I needed a jack to use in raising a part of the car I was working on and as there was none near me I started to look for one. This jack was necessary in doing the work. The men working there, when they get through using a jack throw it down and leave it by the track where they were at work and when you want one you must go and find it. There were from 50 to 100 men at work there and only about 6 jacks. I knew there was a jack on track 3 and to get to track 3 from where I was working on track 5 I had to cross over track 4. I went from the car I was at work on to track 4 and looked towards the brick shed for a jack; then down towards the switches where I was working. I could not see any and as I knew there was one on track 3 I crossed track 4 and just as I was about the center of the track a car ran against me and knocked me down. I was struck by the coupler of the car and I think the car went about a car length after I was struck. From the place where I was working I could not see the switch where track No. 4 connects with the lead and I could not see the switch engine coming in or sending cars in on track No. 4.

I went to work at one o'clock after finishing my dinner and there was no signal or movement of cars

(Testimony of Emil R. Schoeffler.)

from one o'clock up to the time of the accident. After the accident I was taken to the Northern Pacific Hospital at Tacoma and remained there until the week before Thanksgiving, but I am still under the care of the hospital. My injuries consisted of my left arm being crushed, my cheek was cut and a bad wound on the scalp where the hair was torn off; my ankle and back were hurt. After I was able to leave the hospital I went up every day until June of last year for treatment, and I still go every two weeks. (Here witness exhibits his arm to the jury.) My arm was in good condition before the accident and my physical condition was good. I was in good health. I cannot use this arm at all; if I attempt to use it it falls right down. My back and ankle also are weak and I have not been able to do anything since I was injured, except I have served on the election board three times.

CROSS-EXAMINATION.

(By Mr. QUICK):

These repair tracks run parallel and tracks 3, 4, 5 and 6 run under the long open shed, and this is where the heavy repair work is done on the badly damaged cars. The switches to these tracks are provided with private locks and the key to the locks is carried by the car foreman, Mr. Reese, and when a track is to be pulled, that is the cars taken off of it and other cars placed on the track, the foreman unlocks the switch. I had worked on track 3 until noon when the foreman put me to work on a car on track 5. There were about eight cars on track 4 between the switch and the point opposite where I was working on track 5 and these cars were not coupled together but there

(Testimony of Emil R. Schoeffler.)

were spaces between them. Nearest the switch there were two cars and then an open space of about 16 feet; then there were three cars then an open space of 16 or 18 feet; and then two cars then another open space 16 or 18 feet; then 3 cars then another open space and then some more cars, and it was in this last opening where I was injured. (Witness here, at request of counsel, makes a drawing with paper and pencil showing the relative position of the cars, and marking on the same with a cross the place where the accident occurred, which drawing is received in evidence as defendant's Exhibit No. 1.) When I started to get the jack I left where I was working on track No. 5 and walked over to track 4, which is about twenty feet. Then I walked along by the side of the cars which were standing on track 4 about 75 feet until I came to the end of this string of 3 cars that were standing there and then stepped across in the center of the track, intending to go over to track 3, and just as I reached the center of the track the cars moved, knocked me down and ran over me. The cars must have been caused to move by some cars being thrown in onto the track from the switch, or I would not have been knocked down, but I did not see them and did not see what caused the cars to move.

P. BROCKBACK, being called as a witness on behalf of the plaintiff and being sworn, testified as follows:

(Testimony of P. Brockback, for Plaintiff)

DIRECT EXAMINATION.

(By Mr. DENNIS):

I am working for the Chicago, Milwaukee & St.

(Testimony of P. Brockback.)

Paul Railroad in Tacoma, but on the 21st day of July, 1909, I was working at the South Tacoma Shops for the Northern Pacific as a car carpenter or car repairer. I was working on track No. 6 at the time the plaintiff was injured and I did not see the accident, but my attention was called to it by the noise. I saw the engine moving north and the cars were going south and when I came up Mr. Schoeffler was lying between the last wheel and the first wheel beam of the car. I cannot say how many jacks there are for the use of the men, but when we get through using one we just throw it down at the side of the track where we last used it, and when we want one we go and hunt over every track until we find it.

PAUL J. HAAS, being called as a witness on behalf of the plaintiff and being sworn, testified as follows:

(Testimony of Paul J. Haas, for Plaintiff)

DIRECT EXAMINATION.

(ByMr. DENNIS):

I am working for the Chicago, Milwaukee & Puget Sound Railway, but on the 21st day of July, 1909, I was working as a car repairer at the South Tacoma Shops of the Northern Pacific and had worked there for about seven years. I was working on track No. 3 on July 21, 1909, and worked on that track all day. There was a movement of cars on track No. 4 for I heard them bump when the plaintiff was hurt. I could not say whether or not they pulled those tracks in the morning, but I know they did not pull any in the afternoon from after dinner, there was no mov-

(Testimony of Paul J. Haas.)

ing of cars on that track. At the time the plaintiff was injured I was working on track No. 3, which is along side of No. 4, and heard a bumping over there and saw a couple of cars going down. I saw several cars moving; that is all I know about it. I did not see the switch engine. There had been no signal given to me that afternoon. When a track is spotted there is no danger in crossing it to get a jack.

CROSS-EXAMINATION.

(By Mr. QUICK):

I had not noticed how many *tracks* there were on track No. 4 when the plaintiff was injured, as I was not interested in that track. When we are working on a track the foreman has the switch to that track locked and he carries the key to it, and when a track is to be pulled the foreman goes along and tells the men to get out. He removes them from the track before he unlocks the switch, then when the track is pulled by taking the cars off of it, the track is again supplied with other bad order cars. If when a track is pulled there are some cars which were on the track that the repairs have not been finished on, these cars are again set back on the track and then other bad order cars are put in with them, and when the track is refilled with bad order cars the foreman locks the switch.

I was working on track 3 and was not paying particular attention to track No. 4, but I did hear the bumping of some car on that track.

Q. And if there were on this track at the time of the accident two cars next to the switch, then a space of about 18 feet, and three more cars, then another

(Testimony of Paul J. Haas.)

space of about 18 feet, and two more cars and then a space of about 20 feet to a place where there were 3 cars, and if these cars were all shoved together so as to move the last 3, it would make considerable bumping, would it not?

A. Yes, it would.

Q. And considerable noise?

A. Yes, sir.

FRED HAAS, being called as a witness on behalf of the plaintiff and being sworn, testified as follows:

(Testimony of Fred Haas, for Plaintiff)

DIRECT EXAMINATION.

(By Mr. DENNIS):

I am in the employ of the Northern Pacific Railway Company and on the 21st of July, 1909, I was Assistant Car Foreman at the shops at South Tacoma, under Mr. Reese, who was the regular Foreman. Both the foreman and the assistant have keys for locking and unlocking the switches to the repair tracks, that is the track where bad order cars are placed for the purpose of being repaired. At the time of the accident to the plaintiff I was in the hospital and had my key with me. There were about 100 men employed in the repair department and they had about 6 or 7 jacks, and when the men were through with using one they would leave it by the side of the track and when other men wanted one they of course had to go and look for it. The following rule, which was in force, required the tracks to be kept locked:

"All repair and shop tracks shall be locked with

(Testimony of Fred Haas.)

private locks by men in charge of the repair tracks or shops and no one shall be allowed to unlock switches except the men in charge of repair tracks or shops."

CROSS-EXAMINATION.

(By Mr. QUICK):

Mr. Reese, the foreman, and myself each had keys to the switch locks leading to these repair tracks and whenever we were ready to have a track pulled, that is the cars which had been repaired taken from the track and the track refilled with bad order cars, we would notify the crew operating the switch engine that attended to the pulling of these tracks. Before we would open the switch so that the engine could come in and remove the cars, we would notify the men working on the track that was to be pulled, if there were any there. If when pulling a track there were any cars on which the repairs had not been finished, these cars would be set back on the track and other bad order cars sufficient to fill the track would be thrown in. In filling the track with bad order cars the switching crew would simply give the cars a shove and let them run in on the track. As the cars were bad order cars thrown in there for the purpose of being repaired there was no care taken by the switching crew to prevent them from bumping together, nor did the engine or any of the switching crew follow the cars in from the switch. It would take considerable time to refill the track after it was pulled and during all this time the switch was left open and cars were thrown in just as the switching crew could get hold of them, and after the track was

(Testimony of Fred Haas.)

filled, then either the foreman or myself would lock the switch and then it was impossible to put in other cars or for the engine to come in on the track until the switch was again unlocked.

H. MORSE, being called as a witness on behalf of the plaintiff and being sworn, testified as follows:

(Testimony of H. Morse, for Plaintiff)

DIRECT EXAMINATION.

(By Mr. DENNIS):

I am working for the Milwaukee Road, but on the 21st of July, 1909, I was employed by the Northern Pacific Railway Company. I have worked as a switchman for about twenty-five years. I worked for a long time at South Tacoma Yards and worked in switching on tracks 3, 4, 5 and 6, the switching tracks. In pulling one of the repair tracks we would go in with the engine and couple onto the cars and pull them all out onto the lead, and the cars which were repaired were separated then from the others and the ones that required further repair work were started back towards the track and when a sufficient number to fill the track were thrown in the engine would then space the cars so that there would be from 12 to 20 feet between each cut of cars, and from 2 to 4 cars in a cut as it came handy. After this was done the switch would be locked by the foreman of the repair tracks and the only persons who could unlock it was the foreman or his assistant, and before the engine crew could get back onto this track again they would have to see Mr. Reese as a rule, and when the track was spotted there would be no danger to a car

(Testimony of H. Morse.)

repairer in going across the track or between the cars.

CROSS-EXAMINATION.

(By Mr. QUICK):

I was not a member of the switching crew that was engaged in pulling the track or working there on the 21st day of July, 1909, at the time the plaintiff was injured. Before the engine crew can get in onto these tracks it is necessary to have them unlocked by the foreman and then we pull the track and throw in bad order cars until it is again filled.

JOHN KELLY, being called as a witness on behalf of the plaintiff and being sworn, testified as follows:

(Testimony of John Kelly, for Plaintiff)

DIRECT EXAMINATION.

(By Mr. DENNIS):

I am employed by the City of Tacoma and have been for ten months, but prior to that time I worked for the Northern Pacific at the South Tacoma Shops as a steel tire setter. I worked there eight years. My work took me in and around the repair shops. When a repair track is spotted there should not be any danger because the switch is locked at the north end of the track. A car repairer tells whether or not a track is spotted by the space between the cars. Car repairers get jacks by going back and forth from one track to another looking for them.

CROSS-EXAMINATION.

(By Mr. QUICK):

The cars have to be put in on the repair track before they are placed and while they are being put in

(Testimony of John Kelly.)

the switch is open so that the engine can work in and out and as long as the engine is throwing cars in the switch is open and the track is in use by the engine crew and the car repairers can see that the cars are moving by looking. The car repairers are not at work upon the track while it is being pulled or replenished.

TOM ROONEY, a witness called and sworn on behalf of the plaintiff, testified as follows:

(Testimony of Tom Rooney, for Plaintiff)

DIRECT EXAMINATION.

(By Mr. DENNIS):

I am in the employ of the Northern Pacific Railway Company as a switchman and was so employed on the 21st day of July, 1909, at the time the plaintiff was injured. I was in charge of the switch engine at that time and it was a part of my work to go to South Tacoma right after dinner, and on that afternoon we were pulling repair track No. 4. At about 5 o'clock we had pulled the cars off of track No. 4 and were putting bad order cars back onto it. We had also pulled track No. 2, which is a light repair track, and we were throwing the cars from track No. 2, which had been marked for heavy repairs, onto track No. 4 and as we would throw these cars in they would strike against other cars which had been thrown in on the track, and it was when we threw in some of these cars and they struck the other cars that Mr. Schoeffler was hurt.

(Testimony of Tom Rooney.)

CROSS-EXAMINATION.

(By Mr. QUICK):

My work was to go to South Tacoma in the afternoon and pull the repair tracks and bring the cars which had been repaired down to the yard here. We got there in the afternoon about 3:30 o'clock and we pulled track No. 4 first in order to make room for the heavy repairs that would be taken off of the light repair track. We had pulled track 4 and taken the cars out on the lead and sorted out the ones that had been repaired and placed them on the transfer outside of the fence. We then pulled track No. 2 and were putting the cars which were marked for heavy repairs onto track 4 and we had put in 6 or 8 cars onto track 4 at the time the plaintiff was hurt at about 5 o'clock.

When we pull a track we wait until the car foreman unlocks the switch and tells us the track is ready. He has notified the men to get out of the way and we go in there and walk along to see that there are no blocks or anything on the track so we can couple up and pull out. Then we push the cars together and couple them into one string and pull them out onto the lead where we break up the string and set the finished cars out onto the transfer track and kick the unfinished ones back onto the same repair track we have pulled them off of. In kicking them back we just give them a shove with the engine and let them go and after we have kicked in a sufficient number to fill the track, we then push them back with the engine and then pull ahead and spread them out in bunches

(Testimony of Tom Rooney.)

of two or three in a bunch so the men can work between them.

In kicking them in they do not always stand close together, and lots of them have no draw bars and they will naturally part as they start, and there is sometimes considerable space between the cars while the track is being filled. At the time the plaintiff was injured we were engaged in filling the track and it was not over half full; the track holds about thirty cars. As they are kicked in they make considerable noise bumping together.

REDIRECT EXAMINATION.

(By Mr. DENNIS):

The striking together of the cars as they are kicked in makes quite a little noise, so that the men on both sides of the track know that they are being put in. I do not know just how long track No. 4 is, but I think it will hold about thirty cars; the cars are anywhere from 33 to 50 feet long.

Q. Was there any signal given about five o'clock; did the switchman or Mr. Reese give any signal to the men around there about five o'clock that day?

A. I don't know what for or why.

Q. State whether they did or did not?

A. I did not see him doing anything of that kind about that time.

Q. You did not give any signals to any of the men on the tracks?

A. There was no men on the tracks we were using. I did not have any occasion to give them any signal.

Q. And none of your men under you give any

(Testimony of Tom Rooney.)

signal to any of the car repairers?

A. I don't know about that.

(By Mr. QUICK):

Q. There were no car repairers engaged in work on that track at that time?

A. No, sir; they are supposed to keep away from the track until we get through with it.

Mr. DENNIS: According to your theory you were putting in cars all that afternoon?

A. Oh, no; we did not leave here until one o'clock and we took bad orders to South Tacoma, and when the track is ready Reese notifies us. He opened the switch and we pulled the track.

Q. When had you put cars in on that track?

A. We had just started. There was nothing done in it before three-thirty, and probably it was a little later when we got the track.

Q. How many times had you been in on the track before five o'clock?

A. On one of these tracks,—we get one heavy and one light every day.

Q. And this was the first heavy on this?

A. Yes, sir, we pulled the heavy tracks first always.

(Witness excused.)

Defendant's Motion

Mr. QUICK: The defendant now moves the Court to grant a non-suit in this case for the reason that the evidence fails to prove facts sufficient to entitle the case to go to the jury.

Decision of the Court

THE COURT: I think the question whether the defendant had exercised ordinary care to provide a safe place for the plaintiff to work in under this evidence is a question for the jury, and without expressing any opinion as to what the evidence shows in that regard, I will deny the motion for non-suit.

Exception allowed to the defendant.

Defense

Mr. HENRY REESE, a witness called in behalf of the defendant, being duly sworn, testified as follows:

(Testimony of Mr. Henry Reese, for Defendant)

DIRECT EXAMINATION.

(By Mr. QUICK):

I am car foreman at the South Tacoma Shops of the Northern Pacific Railway Company and have been car foreman and working for the defendant for twenty-three years. I was present at the time plaintiff was injured, but did not see the accident. Track No. 4 was being filled with bad order cars at the time. The switching crew had pulled track No. 4 and set out the O. K. cars and were setting back onto No. 4 the bad order cars taken from track No. 2 on which heavy repairs were needed.

Before a repair track is pulled, the men are all taken off of the track and set to work on the cars on other tracks. The switch is then unlocked and the engine comes in and couples the cars together and then pulls the string out onto the lead, and I go down

(Testimony of Mr. Henry Reese.)

on one side of the cars to see if there are any blocks under the wheels or any obstacles in the way, or anything left under the cars that might cause them to jump the track while being pulled, and sometimes one of the switchmen will go down to see if the cars are coupled up. There are no men working on the track at the time it is pulled and there was no one working on track 4 at the time. When a track is to be pulled it has never been the custom to notify the men at work on other tracks. When we get ready to pull, say track No. 4 and there are men working on bad order cars on track 5 or 6, there is no indication given to them that we are going to pull track No. 4.

At the time the plaintiff was injured, track No. 4 had been pulled and they were refilling it with bad order cars, and they had kicked in, I think, three cuts or about eight or nine cars. The track was not near full at the time when we let the engine crew in to pull a track. They pull one heavy repair track and then pull one of the light repair tracks, and then take the cars which are marked for heavy repair and refill the heavy repair track. This is done once every day. When a car repairer comes to a car needing heavy repair work he so marks it and that car is thrown under the shed on one of the heavy repair tracks the next time the switching crew pulls and refills a heavy repair track. In refilling the track the cars are kicked in and not followed by the engine or any of the engine crew and this has been the custom every day since 1906 to my knowledge. After the track is filled the switch is locked by either myself or my assistant, and the engine crew cannot come in again

until we unlock the switch as they have no keys for the locks on the switches to the repair tracks. When the crew comes for the purpose of doing this work they notify me by giving four blasts of the whistle and if we are ready we go down and unlock the switch for them and then go back along the cars to see if there is anything in the way. But before we unlock the switch we remove any of the men from this track who have been working there. This track No. 4 will hold from 28 to 30 cars when it is filled and spaced, that is sufficient space between the cars for the men to work.

I did not see the plaintiff injured; I was about seven cars north, that is between him and the switch, and the engine crew kicked in two bad order cars and these struck the other cars until they reached the one plaintiff was behind. The cars in bumping together made such noise as is ordinarily made in switching by the cars striking together.

CROSS-EXAMINATION.

(By Mr. DENNIS):

At the time of the accident I was between tracks 5 and 6 and about seven or eight car lengths north of where the accident occurred. Track No. 4 is about twelve hundred feet long from the switch to the wheel shop. I think there were only seven or eight cars on the track at the time of the accident, as they had just started switching and there was only a car and a half inside the shed. I cannot say just how they were placed, nor how much space there was between the different cuts.

Q. It is a fact, isn't it, that when a man gets

(Testimony of Mr. Henry Reese.)

through with a jack he leaves it just where he has been using it, and the next person who wants it has to find it over there?

A. Not necessarily.

Q. How many jacks are there in use there?

Mr. QUICK: That is objected to as immaterial; not proper cross-examination, there being no allegation in the complaint that there was not a sufficient number.

The COURT: Objection overruled; exception allowed.

A. All the way from thirty to sixty.

Q. On these four tracks?

A. No; probably twenty-five.

When a small force of men were working there would be about forty. I don't think it was necessary for the men to cross the tracks at all as there were always jacks right beside the tracks where they were working. I could not see where any of them were at the time plaintiff claims he was looking for one.

When we are ready to pull a track we do not yell out to the men at all. The only notice given is by the engine whistle. I don't say anything to them unless some one is going across the track or is in the way, as the men are all put over to work on another track, and when the whistle blows I go down the track and pick out the blocks or anything in the way of the cars after I unlock the switch. That is all the signal that is given. The way a man can tell when the track is filled is by the cars and that they are spaced off or spotted, and when this is done the switch is locked and there is no danger as an engine cannot come in.

(Testimony of Mr. Henry Reese.)

Q. How can the repairer tell whether or not the switch is locked?

A. He can tell because the track is filled and no engine is coming in. If he would cross fifty times he could not get hurt.

Q. And the way he tells that the switch is locked is because it is spotted? A. Yes.

Q. And spaced off? A. Yes, sir.

Q. And that is the way in which you can tell that it is spotted? A. Yes, sir.

Q. And he knows that when that track is spotted and spaced off that the switch is locked or supposed to be? A. Yes, sir.

This track No. 4 on the day of the accident was pulled about 3:30 or a quarter to four. There were about twenty-three cars on the track when it was pulled.

Q. What work had been done on that track that day?

A. The cars were finished in the forenoon and the men were off at two o'clock and placed on track number five. There was not a man on there after two o'clock.

Q. There had been no work on that track that afternoon? A. Not since two o'clock.

Q. Was there work on that track before two o'clock?

A. Yes, sir, all the morning; we finished the track.

Q. Now, did you say a notice was given at three-twenty or thereabouts?

A. Something near that time, when he came on.

(Testimony of Mr. Henry Reese.)

He left the city at 2:30.

Q. Did you give the notice at 3:30 yourself?

A. I don't give any notice.

Q. I thought you told me you were the one?

A. I unlocked the switch, and they blew the whistle.

Q. Who gave the notice that day if anyone?

A. What notice?

Q. That the track was to be opened?

A. No notice given.

REDIRECT EXAMINATION.

(By Mr. QUICK):

Q. There was no one working on the track?

A. No.

Q. And you only give notice when somebody is working on the track?

A. Whenever I unlock the switch and the track is done and the switch engine is up there, they blow the whistle and I unlock the switch.

Q. But what is done in regard to the men working on the track?

A. There are none; there cannot be any men working on there when I go to unlock the switch.

Q. You remove them before that?

A. Yes, sir.

FRED HAAS, a witness called in behalf of the defendant, being duly sworn, testified as follows:

(Testimony of Fred Haas, for Defendant)

DIRECT EXAMINATION.

(By Mr. QUICK):

Q. You say you were assistant foreman out there

(Testimony of Fred Haas.)

in July 1905? A. Yes, sir.

Q. And you also carried a key to this lock?

A. Yes, sir.

Q. When the track was to be pulled, what was done with the men working on the track?

A. When the track is ready to pull and the cars were ready, we put the men to some other job immediately, on another track.

Q. Was that done before the switch was unlocked? A. Yes, sir.

Q. And what was the custom in regard to notice to the men on the other tracks?

A. No, sir, no notice given to them.

Q. No notice given to them? A. No, sir.

CROSS-EXAMINATION.

(By Mr. DENNIS):

Q. Now, when a person came down to give notice, was anything said around there at all?

A. Around where?

Q. Did you give the notice yourself?

A. Sometimes, yes.

Q. And sometimes you would come down and what would you say?

A. Sometimes I would holler to them and say that the track was all clear.

Q. And the switchman came down at the same time? A. Generally, yes.

Q. And did he give any notice?

A. I don't think he did; he just went up to see that the couplers were all right.

Q. Would he say anything as he went there about the track being pulled?

(Testimony of Fred Haas.)

A. I don't know that he would as a custom; some did.

Q. You heard them do that?

A. I heard some of them.

Q. And that despite the fact that there wasn't anybody on the track; that is, when there were not any repairers on the track at the time?

A. No, there wasn't.

(Witness excused.)

FRANK BAILEY, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of Frank Bailey, for Defendant)

DIRECT EXAMINATION.

(By Mr. QUICK):

I have worked as a car repairer for the defendant at its South Tacoma shops for four years. I worked cars placed on tracks one to six, which are the repair tracks.

Q. What is the custom there when they are going to pull a track; do they notify the repairers at work upon other tracks?

A. No, sir; when they are to pull the track, there is no men there, and there is not supposed to be any men there until they get it filled and spaced.

Q. If they were pulling track No. 4, would the repairers on tracks five and six be notified?

A. No, sir. I was working on track No. 6 when Mr. Schoeffler got hurt, and I did not know anything about it until they had him on the flat car.

(Testimony of Frank Bailey.)

CROSS-EXAMINATION.

(By Mr. DENNIS):

Q. Now, Mr. Bailey, you have to cross the tracks once in a while? A. Yes, sir.

Q. For the purpose of getting jacks and other tools? A. Yes, sir.

Q. How is it you know that the track is spotted?

A. The same as the other men have stated; the switch is locked and the cars spaced out and jacked up on horses awaiting for us to work them long before we get there.

Q. When the track is spotted you know it is safe?

A. Yes, sir.

Q. And if spotted you go ahead?

A. The cars are spaced for the trucks to go in at each end.

Q. How long is a truck, by the way?

A. Something like ten feet, I think.

Q. Isn't it a fact that sometimes the switchman goes down and yells out when a track is to be pulled?

A. On that track that they are pulling they will come along on one side of the cars and Henry on the other, and if there are men in the way they will warn them.

Q. They will yell out that the car is to be pulled?

A. Sometimes.

Q. And Reese has done that?

A. Well he has never come around and told the men he is going to pull it.

Q. Doesn't he often come down and yell out?

A. If there is anyone in there.

Q. And he would yell that out?

(Testimony of Frank Bailey.)

A. That he was to pull the track and to watch out if there was anyone crossing.

Q. He would go down between the track that is to be pulled and the other track and yell out that the track is to be pulled? A. Yes.

Q. What would he say?

A. He hardly ever did much yelling; the switchmen generally notify them.

Q. And the switchman has yelled also?

A. Not much yelling. After the switch is unlocked they go in and get them.

Q. The men on the two tracks on each side can hear them of course?

A. Oh, yes, of course, you can hear them.

(Witness excused.)

C. HAMLIN, a witness called and sworn in behalf of the defendant, testified as follows:

(Testimony of C. Hamlin, for Defendant)

DIRECT EXAMINATION.

(By Mr. QUICK):

I have worked for the Northern Pacific as a car repairer at its shops close to four years, but I was not working there the day the plaintiff got hurt, but I had worked there prior to that time.

Q. What is the custom if they are going to pull a track; what do they do?

A. They pull the track when the men are done with the work. When the men are done with the work, they are taken away and put on another track to work, and when they are ready to pull it, when they get time, they come around and whistle and the fore-

(Testimony of C. Hamlin.)

man opens the switch and the switchmen come in and couple up the cars in a string and pull them out, and they, if there are any cars which are not finished, they take them out and shove them back again.

Q. Just kick them back?

A. Just kick them back.

Q. Suppose they are going to pull track five and you are working on track three, do you get any notice of it? A. No, sir.

Q. Nor if you are on track four, do you get any notice of it? A. No, sir.

Q. They don't notify the men on the track which is not to be pulled?

A. No, sir, it is not necessary.

CROSS-EXAMINATION.

(By Mr. DENNIS):

Q. What were your last two words?

A. I said it was not necessary.

Q. Now, isn't it a fact that you have to cross the tracks in the line of your work?

A. You don't need to when the track is pulled; when they are pulling the cars in.

Q. Isn't it sometimes necessary to cross the track? A. Oh, yes.

Q. For the purpose of getting tools and jacks?

A. Yes, sir, but not unless the track is spotted.

Q. When is the track spotted?

A. When the switch is locked.

Q. And how do you know when it is locked?

A. You can see when the cars are separated and the track full.

Q. That is when there are spaces between the

(Testimony of C. Hamlin.)

cars? A. Yes.

Q. And they are separated out in three's or four's? A. Yes.

Q. And at that time you feel it is perfectly safe to cross? A. Yes, sir.

Q. Have you ever heard Mr. Reese or Mr. Haas come down and yell out?

A. Yes, if anybody is crossing or anybody around there when they pull, they yell out to them.

Q. They yell out, and the switchmen also yell out?

A. Yes, sir, if there is anybody around, they do.

Q. And the men on the two tracks besides that can hear it? A. Yes, sir.

REDIRECT EXAMINATION.

(By Mr. QUICK):

Q. They do that when they are going to pull a track? A. Yes, sir.

Q. Do they do that when they are shunting the cars back? A. No.

(Mr. DENNIS):

Q. When they are shoving the cars in there is a brakeman on the top of the car going in on the first car?

A. No, sir. There is nobody on them when they kick them back in.

JOHN DOYLE, a witness called and sworn in behalf of the defendant, testified as follows:

(Testimony of John Doyle, for Defendant)

DIRECT EXAMINATION.

(By Mr. QUICK):

I have been in the employ of the Northern Pacific

(Testimony of John Doyle.)

Railway Company continuously for twenty-four or twenty-five years as a switchman, and at the time the plaintiff was injured I was Assistant Yard Master. I have switched at the South Tacoma yards and at the repair tracks located there ever since they were first built, and I worked there for four or five years immediately preceeding last December. In the afternoon I would be sent an extra engine from the yard to pull the repair tracks and I would go to Mr. Reese and find out what tracks he was going to pull that day and what time they would be ready. When the engine would come up the engineer would give four blasts of the whistle to call them. As soon as they unlock the switch, when I was pulling the tracks myself, I always went along every car and looked underneath to see if there were any chunks to throw the cars off and would open the knuckles so that they would couple. They are all automatic couplers. One of the switchmen would go clear up to the last car; generally the foreman of the switch engine was the one to do this; and another switchman would go about middle way so that he could see the foreman and they would couple the engine on, and when the string was coupled up the engineer would be given the signal to start. In coupling up the string he would generally hit them pretty hard because many of the couplers are new and stiff and do not couple by coming up easy. You must hit them pretty hard so as to make them close. It makes quite a racket going in there. When they are coupled up we pull out onto the lead and good orders are thrown out on the transfer track outside of the fence which holds

(Testimony of John Doyle.)

sixty-five or seventy cars, and if there are any in the string which are not finished they are kicked back. We then pulled one of the light repair tracks and if there are any cars on it marked "heavy" they are kicked in on the heavy repair track we have just pulled and we kick in any other cars for heavy repair work until the track is filled. Tracks three and four hold about twenty cars under the shed, and eight or nine outside the shed.

We do not follow the cars in until we get about enough to fill the track then a man gets on the first car which is kicked in and we push the cars back to the end of the track, then we scatter them out or split them up four or five together, or maybe two in one place and four or six in another, just as they happen to be on account of their condition.

When the track is filled Mr. Reese will lock the switch then we cannot do any more with it and cannot get in until the switch is again unlocked.

CROSS-EXAMINATION.

(By Mr. DENNIS):

When the track is finally spotted there would be about eight cars outside the shed and the cars would be grouped into two's and three's and sometimes four's and sixes, all owing to where they can be cut.

V. W. ROBINSON, a witness called an sworn in behalf of the defendant, testified as follows:

(Testimony of V. W. Robinson, for Defendant)

DIRECT EXAMINATION.

(By Mr. QUICK):

I have been employed by the defendant as a switch-

man since 1907, and about a year of that time at the South Tacoma shops where I assisted in switching the repair tracks. At the time the plaintiff got hurt I was helping Mr. Rooney and we were pulling track No. 4. I think we began work about four o'clock and we had pulled the track and were throwing the heavies back onto track No. 4.

Q. When you throw the heavies back onto the track after you pull it, does any switchman go back with the cars?

A. No, sir, it is not necessary for him to do it. The track belongs to us; it has been unlocked by the rip track foreman and we are governed accordingly. The cars are not protected as they come back.

Q. How long do you sometimes work on a track that way before it is finished?

A. That depends; you understand we get one light and one heavy track every afternoon. We pull the heavy first, separate the cars out the same as our lights. The heavies are put right back in the track. We pull the light track, using three or four pulls, because there are four, and when we think we have enough to fill a heavy, we send a man back to the rear and shove it in, and space them leaving two or three or four cars in a space.

Q. Does that sometimes take the larger part of the afternoon?

A. Yes, it will take at least three hours to wind up the business there in South Tacoma.

Q. On the repair track from the time it is opened until you quit?

A. Yes, sir, until it is locked up again.

(Testimony of V. W. Robinson.)

Q. And does the switching crew have any keys to those locks? A. No, sir.

CROSS-EXAMINATION.

(By Mr. DENNIS):

Q. You say this accident happened about what time?

A. That I couldn't say, I don't remember, but it was between four and five.

Q. In fact you have forgotten a good deal about the whole affair?

A. Oh, no; I couldn't not forget it,—hearing the man.

Q. The only thing you have forgotten is the time of the day?

A. Well, that is practically everything I have forgotten, yes.

Q. How many cars had you put on that track prior to this time?

A. There could not have been many; I was working in the field at the time; I don't suppose over seven or eight cars.

Q. Where had you gotten those cars?

A. Right out of that track.

Q. How many trips did you make to put them there?

A. When we went down we dragged the entire track as I remember. We might have left one or two on the rear end, that were heavy; we would not drag them out. We cut off ahead of the heavies and threw back.

Q. How many times did you send cars in on this track number four?

(Testimony of V. W. Robinson.)

A. Possibly three or four switches in getting the cars down that way.

Q. Your idea is you had sent cars on three or four different occasions?

A. Down that way, towards track number four.

Q. Upon track four?

A. Yes, upon track four.

Q. You had sent four different lots of cars on track four that afternoon?

A. We had sent two or three cuts.

Q. Those happened to run in and be spaced off?

A. Oh, no; sometimes we find a car which hasn't a draw-head, and it will place itself.

Q. Now does this sketch show the position of the cars on that track?

A. Well, yes, that is supposed to be track four.

Q. Do you know when you brought those cars in?

A. We kicked them back.

Q. How far back did they kick?

A. They went back quite aways; seven or eight or ten cars.

Q. Did they go beyond the shed?

A. No, I don't think so.

Q. You don't think you pushed any cars inside the shed?

A. Oh, we spotted the entire track later on.

Q. I mean before this time, when Schoeffler was injured?

A. We had not spotted the track, no, sir.

Q. But had you sent any cars in there?

A. We were kicking in that way all the time.

Q. That is from three o'clock?

(Testimony of V. W. Robinson.)

A. Until we finished the work.

Q. What time did you start that afternoon?

A. It was in the neighborhood of between three and four; I don't know exactly; sometimes we are earlier than others; I could not say the exact time.

Q. You don't know what time you started that afternoon?

A. No, sir, not exactly.

Q. But you know you took one lot and sent them in on that track and then went and got another lot and then a third and fourth lot?

A. No, sir, we did not send them back; we dragged the entire track and kicked back that way as we came to the heading.

Q. Now I don't quite understand, but what I mean is, did you send the whole six or eight or ten cars at once?

A. Oh, no; we sent them as we came to them.

Q. Then as you came to one set of cars you took them off of track two and went up the house track and sent them in?

A. Oh, no; we pulled track four, the heavy track; later on we pulled the light repair track, throwing the heavies toward track four.

Q. What time did you pull track four?

A. That was the first track known as the heavy.

Q. When did you pull that?

A. I could not say exactly; between three and four.

Q. You pulled the cars out of that track?

A. The entire bunch.

Q. Then went and put these others in?

(Testimony of V. W. Robinson.)

A. The cars that belonged back that way; we headed them in four.

Q. When you sent them in towards four, did you send in the whole string at once or at different times?

A. It would be impossible to do that; we take the good ones from the bad ones.

Q. Then you did not send them in all at once?

A. Oh, no; we got the good ones out of this track; we could not send them all at once.

The COURT: Q. I understand the object in doing this work is to separate the line of cars and pull out the whole thing, and then separate the good ones which happen to be here and there and push them back in small installments?

Mr. DENNIS: That is what I mean.

The COURT: Is that correct, Mr. Witness?

A. Yes, sir.

(By Mr. DENNIS):

Q. Was any signal given before you started to pull the track? A. Yes, sir, always.

Q. Did you see the signal given this time?

A. Yes, sir.

Q. Who gave the signal?

A. Mr. Reese opened the switch and the whistle was blown.

Q. Was there any other signal given?

A. Yes, sir; I walked myself, and I do not know but what Mr. Rooney walked with the man to the rear of the track; it is customary, looking for things that might be in the way, causing derailment.

Q. Did you say anything as you went down that track; did you yell out at all?

(Testimony of V. W. Robinson.)

A. There was no one to talk to, except the cars.

Q. You can answer that by yes or no?

A. Yes, sir, any way you want.

Q. Did you or did you not say anything as you went down there, yell out to anybody?

A. Nobody to yell to, except whoever it might be along, possibly Mr. Rooney.

Q. You did not yell out to anybody?

A. Nothing to yell to. No, sir, I did not.

Q. When Mr. Rooney went down, he did not yell out to anybody?

A. I did not hear him yell.

Q. Did Mr. Reese? A. On that occasion?

Q. Yes?

A. I did not hear him yell.

Q. And Mr. Reese was the one who unlocked the switch? A. Yes, sir.

(By Mr. QUICK):

Q. When these cars are kicked back in, they don't couple together? A. Not always.

Q. Sometimes there are spaces between them?

A. Yes, sir.

(Witness excused.)

(Testimony of Emil R. Schoeffler, in Rebuttal)

EMIL R. SCHOEFFLER, being called in rebuttal, testified that he looked on tracks five and six for jacks. That there were none on six, and one on five, but that was in use.

(Testimony of H. Morse, in Rebuttal)

H. MORSE, being called in rebuttal, testified as follows:

(Testimony of H. Morse.)

Q. In regard to this whistle, state what was the custom in regard to whistling?

A. They usually whistle when they cannot find the foreman of the repair tracks.

Q. Was it used for any other purpose?

A. Well, they usually use it to call him.

Q. Was the whistle always given.

A. Oh, no.

Q. Was there any way in which a car repairer could tell by the whistle what particular track they were going on? A. No, sir.

Defendant's Motion

(By Mr. QUICK):

Defendant now challenges the sufficiency of the evidence and moves the Court to direct a verdict for the defendant for the reason that the evidence fails to prove facts for the case to go to the jury.

The COURT:

The motion will be denied and exception allowed to the defendant; without intimating to the jury any opinion on any question of facts involved in the case.

The cause was thereupon argued to the jury by counsel for the respective parties.

The Court thereupon charged the jury as to the law of said case, after which the jury retired to consider their verdict.

Verdict

Thereafter the jury returned into Court its verdict in favor of the plaintiff, assessing his damages in the sum of $6,500.00.

Now, in the furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in this cause, and prays that the same may be settled, allowed, signed and certified by the judge as provided by law and filed as a bill of exceptions.

GEO. T. REID,
J. W. QUICK,
L. B. DaPONTE,
Attorneys for Defendant.

The Court in his instructions to the jury gave the following: There is evidence here on both sides relating to the number of jacks which were maintained in that shop and you will understand that the plaintiff does not base his right to recover upon the failure of the company to provide a sufficient number of jacks. The question, however, of the number of jacks and where they were kept is properly for you to consider as bearing upon the question whether it was proper or necessary for the plaintiff to cross the track in question, as bearing upon the reason why he crossed, and the necessity for crossing or the propriety of his crossing.

Service of the foregoing bill of exceptions and receipt of copy thereof is hereby acknowledged this 22nd day of May, 1911.

RAY & DENNIS,
Attorneys for Plaintiff.

(Endorsed):

"FILED
U. S. CIRCUIT COURT,
Western District of Washington,
JUNE 3, 1911.
SAM'L D. BRIDGES, Clerk."

Order Settling Bill of Exceptions

Now, on this 3rd day of May, 1911, the above cause coming on for hearing on the application of the defendant to settle the bill of exceptions in said cause, defendant appearing by J. W. Quick, its attorney, and the plaintiff appearing by Ray & Dennis, his attorneys, and it appearing to the Court that the defendant's proposed bill of exceptions was duly served on the attorneys for the plaintiff within the time provided by law and that no amendments have been suggested thereto and that counsel for plaintiff have no amendments to propose, and that both parties consent to the signing and settling of the same, and that the time for settling said bill of exceptions has not expired, and it further appearing to the Court that said bill of exceptions contains all the material facts occurring in the trial of said cause, together with the exceptions thereto and all the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions and the Clerk of this Court is hereby ordered and instructed to attach the same thereto;

Therefore, upon motion of J. W. Quick, Esquire, attorney for defendant, it is hereby

ORDERED that said proposed bill of exceptions be and the same is hereby settled as a true bill of exceptions in said cause, and that the same is hereby certified accordingly by the undersigned judge of this Court, who presided at the trial of said cause, as a true, full and correct bill of exceptions, and the Clerk of this Court is hereby ordered to file the same

as a record in said cause and transmit the same to the Honorable Circuit Court of the Appeals for the Ninth Circuit.

GEORGE DONWORTH,
Judge.

(Endorsed:)

"FILED
U. S. CIRCUIT COURT,
Western District of Washington,
JUNE 1, 1911.
SAM'L D. BRIDGES, Clerk."

Assignment of Error

Comes now the defendant, Northern Pacific Railway Company, and files the following assignment of errors upon which it will rely upon its prosecution of its writ of error in the above entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, for relief from the judgment rendered in said cause.

I.

The Honorable Circuit Court erred in overruling the motion made by the defendant for a non-suit at the close of plaintiff's case. To which ruling of the Court defendant excepted, which exception was duly allowed by the Court.

II.

The Honorable Circuit Court erred in overruling the motion made by the defendant for judgment in its favor, at the close of all the evidence in the case, for the following reasons:

III.

The evidence failed to prove negligence on the part of the defendant as the proximate cause of the injury.

That the evidence proved that the plaintiff's injury was caused by the contributary negligence of the plaintiff.

That the evidence proved that the plaintiff assumed the risk.

WHEREFORE, defendant, plaintiff in error, prays that the judgment of the Honorable Circuit Court of the United States for the Western District of Washington, Western Division, be reversed and that such direction be given that full force and efficiency may inure to defendant by reason of its defense to said cause.

GEO. T. REID,
J. W. QUICK,
L. B. DaPONTE,
Attorneys for Defendant.

(Endorsed):

"FILED
U. S. CIRCUIT COURT,
Western District of Washington,
JUNE 26, 1911.
SAM'L D. BRIDGES, Clerk."

Petition for Writ of Error

The defendant, Northern Pacific Railway Company, feels itself grieved by the verdict of the jury and the judgment entered thereon in the above entitled cause, comes now by its attorneys and petitions

this Honorable Court for an order allowing it to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error and that the judgment heretofore rendered be superseded and stayed, pending the determination of said cause in the Honorable Circuit Court of Appeals.

GEO. T. REID,
J. W. QUICK,
L. B. DaPONTE,
Attorneys for Defendant.

(Endorsed):

"FILED
U. S. CIRCUIT COURT,
Western District of Washington,
JUNE 26, 1911.
SAM'L D. BRIDGES, Clerk."

Order Allowing Writ of Error

Upon motion of J. W. Quick, attorney for the above named defendant, and upon filing a petition for a writ of error and assignment of errors, it is hereby

ORDERED, that a writ of error be and is hereby allowed to have reviewed in the Honorable United States Circuit Court of Appeals for the Ninth Circuit the judgment entered herein; and it is further ordered that the amount of bond on said writ of error is hereby fixed at the sum of $6,000.00 to be given by the defendant, and on the giving of said

bond the judgment heretofore rendered will be superseded pending the hearing of said cause in the Honorable Circuit Court of Appeals.

IN WITNESS WHEREOF, the above order is granted and allowed, this 29th day of June, 1911.

C. H. HANFORD,
Judge.

(Endorsed):

"FILED
U. S. CIRCUIT COURT,
Western District of Washington,
JUNE 30, 1911.
SAM'L D. BRIDGES, Clerk."

Bond on Writ of Error

KNOW ALL MEN BY THESE PRESENTS:

That we, Northern Pacific Railway Company, a corporation, as principal, and National Surety Company, a corporation organized under the laws of the State of New York and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Emil R. Schoeffler, plaintiff in the above action, in the sum of Six Thousand Dollars ($6,000.00), for which sum well and truly to be paid to said Emil R. Schoeffler, his executors, administrators and assigns, we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of June, A. D. 1911.

The condition of this obligation is such that whereas, the above named defendant, Northern Pacific Railway Company, a corporation, has sued out a writ

of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment in the above entitled cause by the Circuit Court of the United States for the Western District of Washington, Western Division, and whereas, the said Northern Pacific Railway Company desires to supersede said judgment and stay the issuance of execution thereon pending the determination of said cause in the said United States Circuit Court of Appeals, for the Ninth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the above named Northern Pacific Railway Company, a corporation, shall prosecute said writ of error to effect and answer all costs and damages awarded against it, if it shall fail to make good its plea, than this obligation shall be void; otherwise the Court may enter summary judgment against said Northern Pacific Railway Company and said surety for the amount of such costs and damages awarded against said Northern Pacific Railway Company and this obligation to remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY
By GEO. T. REID,
(SEAL) *Its Attorney.*

NATIONAL SURETY COMPANY,
By W. H. OPIE,
Attorney in Fact.

APPROVED THIS 11th DAY OF JULY, A. D. 1911.

C. H. HANFORD,
Judge.

(Endorsed):

"FILED
U. S. CIRCUIT COURT,
Western District of Washington,
JUNE 30, 1911.
SAM'L D. BRIDGES, Clerk."

UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

NORTHERN PACIFIC RAILWAY COMPANY, (corporation),

Plaintiff in Error,

vs.

EMIL R. SCHOEFFLER,

Defendant in Error.

Writ of Error

UNITED STATES OF AMERICA,

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE HONORABLE THE JUDGES OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, WESTERN DIVISION.

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in

the said Circuit Court before you, or some of you, between Northern Pacific Railway Company, a corporation, plaintiff in error, and Emil R. Schoeffler, defendant in error, a manifest error hath happened to the damage of the said plaintiff in error, as by its answer appears, we being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at San Francisco, California, in said Circuit on thirty days from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to law and custom of the United States ought to be done.

WITNESS THE HONORABLE EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 19th day of July, A. D. 1911.

SAM'L D. BRIDGES,

Clerk of the Circuit Court of the United States for the Western District of Washington.

(Endorsed):

"FILED

U. S. CIRCUIT COURT

Western District of Washington

JULY 25, 1911.

SAMUEL D. BRIDGES, Clerk."

Citation

THE UNITED STATES OF AMERICA,

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO EMIL R. SCHOEFFLER, Defendant in Error,

GREETING.

You are herby cited and admonished to be and appear at the United States Court of Appeals for the Ninth Circuit, at the Court room of said Court, in the City of San Francisco, and State of California, within thirty days from the date of this citation, pursuant to writ of error filed in the Clerk's office of the Circuit Court of the United States for the Western District of Washington, Western Division, wherein Northern Pacific Railway Company, a corporation, is plaintiff in error, and Emil R. Schoeffler, is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done in that behalf to the parties.

WITNESS the Honorable Edward Douglas White, Chief Justice of the United States, this 19th day of July, A. D. 1911.

C. H. HANFORD,

Judge of the U. S. District Court for the Western District of Washington, presiding in Circuit Court of the United States, for the Western District of Washington.

(Endorsed):

"FILED
U. S. CIRCUIT COURT,
Western District of Washington,
JULY 25, 1911.
SAM'L D. BRIDGES, Clerk."

"Service of the above is hereby acknowledged this 26th day of July, A. D. 1911.

RAY & DENNIS,
Attorneys for Plaintiff,
526-527-528 Cal. Bldg., Tacoma, Wash."

Clerk's Certificate

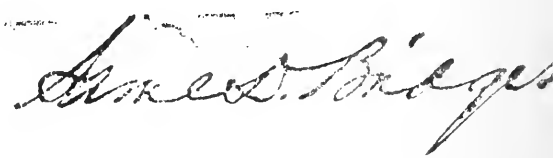
UNITED STATES OF AMERICA, WESTERN DISTRICT OF WASHINGTON.—*ss.*

I, SAM'L D. BRIDGES, Clerk of the United States Circuit Court for the Western District of Washington, do hereby certify that the foregoing papers are a true and correct copy of the record and proceedings in the case of EMIL R. SCHOEFFLER, plaintiff, versus NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Defendant, as the same remain on file and of record in my office.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing record to be the sum of $88.15, which sum has been paid to me by the attorneys for the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the City of Tacoma, in said District, this 26th day of July, A. D. 1911.



Clerk.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Plaintiff in Error,

vs.

EMIL R. SCHOEFFLER,
Defendant in Error.

No. 2039

APPEAL FROM THE UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF WASHINGTON, WESTERN DIVISION.

Brief of Plaintiff in Error

GEO. T. REID,
J. W. QUICK,
L. B. da PONTE,
Attorneys for N. P. Ry. Co.

Headquarters Bldg., Tacoma, Washington.

The Bell Press, Printers.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Plaintiff in Error,

vs.

EMIL R. SCHOEFFLER,
Defendant in Error.

No.

APPEAL FROM THE UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF WASHINGTON, WESTERN DIVISION.

Brief of Plaintiff in Error

STATEMENT.

The plaintiff in error prosecutes this appeal from a judgment in favor of the defendant in error, who brought his action to recover damages for personal injuries received on July 21, 1909, while employed as a car repairer at the shops of the plaintiff in error at South Tacoma, Washington.

The railway company at its shops had set apart cer-

tain tracks which were used exclusively as repair tracks and were numbered one to six, inclusive. These tracks turn off from a track called the housetrack, or lead, and the switches are locked with private locks, the keys to which are carried by the foreman and assistant foreman of the repair work. Tracks 1 and 2 were known as "light repair" tracks, and tracks 3 to 6 as "heavy repair" tracks, and cars "which are only slightly damaged and require only light repair work to repair them are placed on tracks 1 and 2. The cars which are badly damaged and require heavy repairs are placed on tracks 3, 4, 5 and 6, which run under a long shed." Each afternoon one heavy repair and one light repair track would be "*pulled.*" This work was performed by a crew in charge of a switch engine in the following manner: The engine crew would come up on the lead track and blow the whistle for the foreman of the repair tracks. The foreman, or his assistant, would go to the lead track and unlock the switch leading to the repair track which was to be "pulled," but before doing so would remove any workmen engaged in working on cars on the track that was to be "pulled" and place them at work upon cars on some of the other repair tracks. When the switch was unlocked the engine crew would come in and couple the cars on the repair track together and pull them out onto the lead track, where the string of cars would be "broken up" by taking the cars which were fully repaired and placing them on the transfer track and then kicking back on to the repair track such cars as were in need of further repairs. The engine crew would then pull one of the light repair tracks in the same manner, and any cars taken from this track which

were in need of heavy repairs would be kicked in onto the heavy repair track, together with any other bad order cars which were brought to the shops for the purpose of heavy repair. After the track was filled, the engine crew would then go in with their engine and space the cars, leaving them in groups of from two to four, with sufficient space between each group for the car repairers to work. The engine crew would then leave and the switch at the lead would be locked by the foreman or his assistant, and no engine or cars could enter upon the track until it was again opened in the same manner.

The process of "pulling" and refilling a repair track with cars was described by the witnes Rooney as follows:

"When we pull a track we wait until the car foreman unlocks the switch and tells us the track is ready. He has notified the men to get out of the way and we go in there and walk along to see that there are no blocks or anything on the track so we can couple up and pull out. Then we push the cars together and couple them into one string and pull them out onto the lead, where we break up the string and set the finished cars out onto the transfer track and kick the unfinished ones back onto the same repair track we have pulled them off of. In kicking them back we just give them a shove with the engine and let them go, and after we have kicked in a sufficient number to fill the track, we then push them back with the engine and then pull ahead and spread them out in bunches of two or three in a bunch, so the men can work between them.

"In kicking them in they do not always stand close together, and lots of them have no draw-bars and they will naturally part as they start, and there is sometimes considerable space between the cars while the track is being filled. At the time the plaintiff was injured we were engaged in filling the track and it was not over

half full; the track holds about thirty cars. As they are kicked in they make considerable noise bumping together.'' (Record, pp. 29-30.)

The defendant in error began working on these tracks as a car repairer on October 3, 1908, and was injured on July 31, 1909. During the morning of the day he was injured he worked on track No. 3, and during the afternoon he worked on track No. 5. About 5 o'clock p. m. he desired to use a ''jack,'' which was needed in raising a part of the car he was working on, and, remembering one had been left over by track No. 3, he started to get it, and to do so it was necessary for him to closs over track 4. (Record, p. 19.) [At the time of the accident there were about fourteen cars standing on track 4, and these cars were separated, or spotted, as we call it.] (Record, pp. 17-18.) ''Nearest the switch there were two cars and then an open space of about 16 feet; then there were three cars, then an open space of 16 or 18 feet; then three cars and another open space, and then some more cars, and it was in this last opening where I was injured.'' * * * (Record, p. 21.) He further testified that ''from the place where I was working I could not see the switch where track No. 4 connects with the lead, and I could not see the switch engine coming in or sending cars in on track No. 4.'' As he stepped around the end of the car standing on track 4 he was knocked down and injured by the moving of the car. (Record, p. 19.) He again testified: ''Whenever a track is spotted, the switch is locked by the car foreman or his assistant, and the engine cannot come in on the track until the foreman

or his assistant unlocks the switch. When they get ready to take the cars off of a track, the foreman or his assistant comes down and unlocks the switch. The first thing is that the foreman notifies the switchman that the track is ready to pull. Then the switchman comes up and looks at the couplers to see if they are open, then he will give the signal for the other switchmen to come in, and they will come in and a man on each side shows signals for the boys to keep away. *At first the foreman notifies the boys to stay away; that is the first thing before the switchmen come in.* Then the switchmen come in and a man is on each side to couple up the cars." (Record, p. 18.)

The defendant in error called as a witness the switchman who had charge of the switch engine at the time he was injured, and he testified on direct examination as follows:

"I was in charge of the switch engine at that time and it was a part of my work to go to South Tacoma right after dinner, and on that afternoon we were pulling repair track No. 4. At about 5 o'clock we had pulled the cars off of track No. 4 and were putting bad order cars back onto it. We had also pulled track No. 2, which is a light repair track, and we were throwing the cars from track No. 2, which had been marked for heavy repairs, onto track No. 4, and as we would throw these cars in they would strike against other cars which had been thrown in on the track, and it was when we threw in some of these cars and they struck the other cars that Mr. Schoeffler was hurt." (Record, p. 28.)

The defendant in error also called as a witness Fred Haas, who, at the time of the injury, was assistant car foreman, but was not present at the time. He testified:

"Before we would open the switch so that the engine could come in and remove the cars, we would notify the men working on the track that was to be pulled, if there were any there. If when pulling a track there were any cars on which the repairs had not been finished, these cars would be set back on the track and other bad order cars sufficient to fill the track would be thrown in. In filling the track with bad order cars the switching crew would simply give the cars a shove and let them run in on the track. As the cars were bad order cars thrown in there for the purpose of being repaired, there was no care taken by the switching crew to prevent them from bumping together, nor did the engine or any of the switching crew follow the cars in from the switch. It would take considerable time to refill the track after it was pulled, and during all this time the switch was left open and cars were thrown in just as the switching crew could get hold of them, and, after the track was filled, then either the foreman or myself would lock the switch and then it was impossible to put in other cars or for the engine to come in on the track until the switch was again unlocked." (Record, pp. 25 and 26.)

This witness when called again to the stand testified that no notice is given to car repairers who are working on tracks other than the one to be pulled. (Record, p. 38.)

Paul J. Haas, a witness for the defendant in error, testified that he was working on track 3 at the time of the accident and "heard a bumping over there and saw a couple of cars going down. I saw several cars moving; that is all I know about it. I did not see the switch engine. * * * I was working on track 3 and was not paying particular attention to track No. 4, but I did hear the bumping of some cars on that track." (Record, p. 23.)

P. Brockback, a witness for defendant in error, testifies: "I was working on track No. 6 at the time the plaintiff was injured, and I did not see the accident. My attention was attracted to it by the noise." (Record, p. 22.)

John Kelly, one of defendant in error's witnesses, testified:

"The cars have to be put in on the repair track before they are placed, and while they are being put in the switch is open so that the engine can work in and out, and as long as the engine is throwing cars in the switch is open and the track is in use by the engine crew and the car repairers can see that the cars are moving by looking. The car repairers are not at work upon the track while it is being pulled or replenished." (Record, pp. 27-28.)

At the close of the evidence on behalf of the defendant in error, the plaintiff in error moved the court for a non-suit, which was denied and exception allowed. (Record, pp. 31-32.)

The evidence on behalf of the plaintiff in error proved that the switch to track No. 4 was unlocked and the track "pulled" about 3:30 p. m. the day of the accident, and that no men were working on this track at the time or had been during the afternoon.

Henry Reese, the foreman in charge of this work, testified that "at the time plaintiff was injured, track No. 4 had been pulled and they were refilling it with bad order cars and that they had kicked in, I think, three cuts of about eight or nine cars. * * * In refilling the track, cars are kicked in and not followed

by the engine or any of the engine crew, and this has been the custom every day since 1906, to my knowledge." (Record, p. 33.) "I did not see the plaintiff injured; I was about seven cars north—that is, between him and the switch; and the engine crew kicked in two bad order cars and these struck the cars until they reached the one plaintiff was behind. The cars in bumping together made such noise as is ordinarily made in switching by the cars striking together." (Record, p. 34.)

These witnesses further testified that no notice or warning is given to employes working on other tracks, as none is considered necessary.

Frank Bailey testified that he had worked as a car repairer at that place for four years and that no notice is given to men working on the other tracks.

"Q. If they were pulling track No. 4, would the repairers on tracks 5 and 6 be notified?

A. No, sir. I was working on track No. 6 when Mr. Schoeffler got hurt, and I did not know anything about it until they had him on the flat car." (Record, p. 39.)

C. Hamlin testified that before they pull a track the men are taken away and put on another track to work.

"Q. Suppose they are going to pull track 5 and you are working on track 3, do you get any notice of it?

A. No, sir.

Q. Nor if you are on track 4, do you get any notice of it?

A. No, sir.

Q. They don't notify the men on the track which is not to be pulled?

A. No, sir; it is not necessary." (Record, pp. 41-42.)

The manner in which the work was being done at the time was also fully shown by the testimony of V. W. Robinson, one of the switchmen, who testified that track 4 had been "pulled" and they were throwing bad order cars back onto the track at the time the plaintiff was injured. (Record, pp. 46-51.) It was also shown by the evidence that repair track No. 4 held about thirty cars and that it was not more than half filled at the time plaintiff was injured.

ASSIGNMENT OF ERRORS.

I.

The court erred in denying the motion of the plaintiff in error for a non-suit made at the close of the evidence of the plaintiff in error. (Record, pp. 31-32.)

II.

The court erred in denying the motion of the plaintiff in error for a directed verdict at the close of all the evidence in the case. (Record, p. 52.)

ARGUMENT.

The evidence fails to prove negligence on the part of the railway company which was the proximate cause of the injury.

Repair track No. 4 had been pulled by the switching crew and was being refilled with bad order cars in accordance with the custom which had been followed for years in performing this work and with which custom the defendant in error was familiar. In refilling the track the cars were kicked in without being accompanied by any person and allowed to remain on the track in such positions as they happened to occupy until a sufficient number was kicked in to fill the track, and it was not claimed by the defendant in error that any notice was ever given to car repairers working on other tracks of the refilling of the track and the kicking in of these bad order cars. The Honorable Circuit Court seemed to be of the opinion in determining the motion

for a non-suit that the question of whether the railway company had "provided a safe place for the plaintiff to work under this evidence is a question for the jury." It will be remembered that the plaintiff had not worked upon track No. 4 during that day, but during the forenoon he had worked on track No. 3 and in the afternoon was working on track No. 5. The place where he was working was absolutely safe. There was no movement of cars on track No. 5. As testified by Switch Foreman Rooney on re-direct examination:

"Q. You did not give any signals to any of the men on the tracks?

A. There were no men on the tracks we were using. I did not have an occasion to give them any signal." (Record, p. 30.)

The defendant in error was guilty of contributory negligence.

When the defendant in error desired to obtain a "jack" to be used in raising the car he was repairing on track 5, he walked over to track 4, a distance of about twenty feet, and then walked "along by the side of the cars which were standing on track 4 about seventy-five feet until I came to the end of this string of three cars that were standing there, and then stepped across to the center of the track, intending to cross track 3, and just as I reached the center of the track the cars moved, knocked me down and ran over me." He then states they must have been caused to move by other cars thrown in onto the track from the switch. (Record, p. 21.) On the same page and just prior to this

testimony he had testified that there were four groups of cars with an open space of 16 to 18 feet between groups, and it is evident that in the movement of the cars one group would come against the other, and in doing so the usual amount of noise was made, which he could have observed and which was observed by the other witnesses who testified in the case. It is clear that he gave no thought to what was occurring around him; that he passed on to track 3 without looking toward the switch, the direction in which the cars were coming, without looking up to see the cause of the noise that was being made by the cars bumping together. The slightest attention on his part would have revealed the movement of the cars. There was nothing concealed, nothing that a man of ordinary care and prudence should not have observed. It has repeatedly been held negligence, which will defeat a recovery, for an employe working on one track where he is safe to walk across another track on which cars may be moved without looking.

Loring vs. Kansas City, Ft. S. & M. R. Co., 31 S. W. 6.

Grand Trunk Ry. Co. vs. Baird, 94 Fed. 946.

The evidence is not contradicted that it was the custom to pull one heavy repair track every afternoon, which custom of course was known to the defendant in error, as he had worked at this place from October until the following July. He must have known that track 4 was the track that would be pulled that afternoon, as the evidence shows that work was completed on the cars on this track and the car repairers all placed

to work upon other tracks, and yet with these conditions open and apparent to him he stepped in front of the cars standing on track 4 without looking and without paying heed to the noise of the moving cars which were bumping together, which noise was heard by the car repairers working on other tracks and who were called as witnesses by the defendant in error.

Defendant in error assumed the risk.

There is no dispute but what the custom of filling the repair track by kicking cars in on the same, as was done at the time of the injury, was the same as had been followed for a number of years and with which the defendant in error must have been familiar. He did not deny that under the custom the cars were kicked in without being accompanied by any person and without any warning being given. The only time that he claimed that any warning was given was when the switching crew would first come in onto the track for the purpose of coupling the cars and pulling them out on the lead, and a careful reading of his testimony taken with that of the other evidence in the record shows that the warnings given on occasions of this character were only to workmen who happened to be crossing between the cars and was not given to car repairers engaged in work on other tracks. But it must be remembered that he was not injured at the time the track was "pulled." He himself does not claim that the track was being pulled at the time he was injured, which is the only time he claims that the switchmen came down the track on one side and the foreman or his assistant on the other. According to the evidence, the track had been pulled over

an hour prior to the time he was injured, which of course could easily occur without his observing it. As stated by witness Haas (Record, p. 23): "I was working on track 3 and was not paying particular attention to track No. 4, but I did hear the bumping of some cars on that track." So the defendant in error was working on track No. 5 and evidently "not paying particular attention to track No. 4." Just the character of work which he had been doing that afternoon was not shown. He may have been working on the inside of a box car and for that reason did not see or hear track No. 4 pulled. He was not interested in track No. 4, as he was given a safe place to work on track 5, which he knew, under the custom, would be protected by the switch being locked during all the time he would be working there. He was not injured at the place designated for him to work, but at a time when he was going to another part of the premises to obtain an implement to use in his work.

Track 4 at the time was not filled with bad order cars, as this track would hold about thirty cars, and the defendant in error testified that "at the time of the accident there were about fourteen cars standing on track 4," and, although the cars were not coupled together, the evidence shows, and it is self-evident, that in kicking the cars in there would be spaces left between them which might cause the track to be taken as "spotted" by one who exercised no care or caution whatever to observe the actual condition.

FELLOW SERVANTS.

Under the rule in force in the courts of the United

States, the defendant in error and the members of the switching crew, who were engaged in pulling and refilling with cars the repair track, are fellow servants.

Northern Pacific Ry. Co. vs. Hambly, 154 U. S. 349, 14 Sup. Ct. Rep. 983.

Northern Pacific Ry. Co. vs. Poirier, 167 U. S. 48, 17 Sup. Ct. Rep. 741.

For the errors herein set forth and discussed, the plaintiff in error asks that the judgment of the Honorable Circuit Court be reversed and that judgment be entered in favor of the plaintiff in error on its motion made for a directed verdict for the reason that the evidence is not sufficient to sustain the judgment.

Respectfully submitted,

GEO. T. REID,
J. W. QUICK,
L. B. da PONTE,
Attorneys for N. P. Ry. Co.

Headquarters Bldg., Tacoma, Washington.

2039 3

IN THE

United States Circuit Court Of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Plaintiff in Error,

vs.

EMIL R. SCHOEFFLER,
Defendant in Error.

No.

APPEAL FROM THE UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF WASHINGTON, WESTERN DIVISON.

Brief of Defendant in Error

RAY & DENNIS
Attorneys for Defendant in Error.

526-7-8 California Building TACOMA, WASHINGTON.

Aller, Printer, Tacoma, Wash.

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Brief of Defendant in Error

STATEMENT.

In the present cause, no exception has been taken to the admission of testimony, nor to the charge of the trial Judge, the only question presented to this Court is whether or not the trial Court erred in denying the motion for an instructed verdict. In order to bring the

evidence more clearly before this Court, defendant in error feels that it is necessary to call attention to certain of the evidence presented.

It is admitted that Schoeffler was an employee, that he was, moreover, doing the very work assigned to him to do, namely the repair of cars. He was working at the very place assigned to him, namely on track five. In the course of his work, it became necessary for him to use a jack. There were from 50 to 100 men in the yards repairing cars and only six or seven jacks. When men were through with using jacks, they left them by the side of the track and when other men wanted one they had to look for it. The men were obliged continually to cross tracks for the purpose of securing jacks.

(Record, Fred Haas, p. 24; Schoeffler, p. 19.)

Schoeffler was working on track 5; there were no jacks on track 6, and there was one on track 3. (Record, p. 19.) To get to track 3, there was only one way of going and that was to cross track 4. This was the regular way of obtaining tools in use in the yards. (Record, Broback, p. 22; Bailey, p. 40; Hamlin, p. 42.) Schoeffler started in the regular way and was injured while so doing.

The following rule was in force and relied upon by the defendant in error:

"All repair and shop tracks shall be locked with private locks by men in charge of the repair tracks or shops and no one shall be allowed to unlock switches except the men in charge of repair tracks or shops."

(Record, pp. 24-25.)

On the day in question, the only person who had a key was Reese, the superintendent in charge of the repair work, who had engaged Schoeffler to work for plaintiff in error and had assigned him his place to work.

The men engaged in the repair of cars knew that it was safe to cross a track when it was "spotted."

(Record, C. Hamlin, p. 43; Kelley, p. 27.)

The only way a car repairer had of telling whether or not a track was spotted was by the position of the cars on the track. If they were separated out in twos and threes with spaces between, they knew that the track was spotted and this was the only way they had of so telling. This is the testimony of all the witnesses.

(Record, Schoeffler, p. 18; Kelley, p. 27; Reese, p. 36.)

Schoeffler from where he was stationed could not see the switch, nor the switch engine coming in. He had to rely upon the track being spotted. Outside of the shed when a track was spotted there would be about 8 cars and they would be grouped in twos and threes and sometimes fours. (Record, John Doyle, p. 45.) They were so situated on this day and there were others inside the shed as far as Schoeffler could see separated out in the same manner.

These cars had been in this same position since 12 o'clock and the accident happened at five in the afternoon. There had been no movement on this track since

the morning. On this point there was a conflict of testimony, but we have the positive testimony of Schoeffler and Paul Haas (Record, pp. 22-23), whom the jury believed.

With the track in this condition, Reese, the foreman in charge of the repair track, who had full control of the placing of cars, unlocked the switch. (Record, p. 51.) Cars were shunted in without any notice and Schoeffler was injured.

The testimony is in dispute as to whether it was customary to give any notice as to whether or not a track was to be pulled or disturbed in any way. The testimony of Schoeffler (Record, p. 18) is as follows in full:

"The first thing is that the foreman notifies the switchman that the track is ready to pull. Then the switchman comes up and looks at the couplers to see if they are open, then he will give the signal for the other switchmen to come in and they will come in and a man on each side shows signals for the boys to keep away. At first the foreman notifies the boys to stay away; that is the first thing before the switchmen come in. Then the switchmen come in and a man is on each side to couple the cars.

Q. Does that signal give you any idea as to the switch or danger of the track?

A. Yes.

Q. What do you know when the signal is given to you in regard to the dangerous condition, if any?

A. To stay off the switch track; that they are switching in there.

The foreman generally unlocks the switch to let the switch engine in after he gives the signal to the car repairers. After the signal is given, we stay off the switch track that is being pulled."

It was admitted by the witnesses for plaintiff in error that this was sometimes done (Record, Fred Haas, p. 38; C. Hamlin, p. 43; Frank Bailey, p. 41), and by all that on the day in question Reese had unlocked the switch and had cars shoved in on this track without giving any signal or warning to the men in the yard that it was unsafe to cross the track.

Upon this evidence, the question presented to the jury was whether or not the plaintiff in error had furnished to the defendant in error a safe place in which to work.

NEGLIGENCE OF DEFENDANT.

According to the testimony as offered by the plaintiff in error, the place was never safe. If the evidence of the witnesses is to be believed, the repairers were bound to cross the tracks day in and day out, without being able to see the switch engine, and without being able to see whether the switch was locked and absolutely no warning was given to them whatsoever. Under their testimony, the place was absolutely unsafe and there was not any attempt to make it otherwise.

Schoeffler's work necessitating his crossing track 4 continually being established, the law imposed the duty upon the master to make it reasonably safe for him to so cross.

Baltimore & Ohio R. Co. vs. Baugh, 149 U. S. 368; 13 Sup. Ct. Rep. 914.

New England Ry. Co. vs. Conroy, 175 U. S. 323; 20 Sup. Ct. Rep. 85.

Westerlund vs. Rothschild, 53 Wash. 626.

Eidner vs. Three Lakes Lumber Co., 45 Wash. 323.

Failure to do this is negligence on the part of the defendant.

Harvey vs. Texas & P. Ry. Co., 166 Fed. Rep. 385.

Western Electric Co. vs. Hauselmann, 136 Fed. Rep. 564.

Sturgeon vs. Tacoma Eastern Ry. Co., 48 Wash. 367.

Beck vs. Southern R. Co., 59 S. E. 1015.

ASSUMPTION OF RISK.

This is part of the contract of service (implied) and therefore the servant does not assume the risk.

"The rule that a servant assumes the ordinary risks of the employment, and that the master is not liable for an injury to one servant resulting from the negligence of a fellow servant has its limitations; and one is that the servant does not assume the risks resulting from a breach of duty of the master to his servants."

National Steel Co. vs. Lowe, 127 Fed. 311.

Harvey vs. Texas & P. Ry. Co., 166 Fed. 385.

FELLOW SERVANTS.

This is a positive duty of the master and cannot be delegated to another so as to relieve the master from liability.

"Again a master employing a servant impliedly engages with him that the place in which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service, he impliedly says to him that there is no other danger in the place, the tools, and the machinery, than such as is obvious and necessary. Of course, some

places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits, the master who provides the place, the tools and the machinery owes a positive duty to his employes in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employe by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Thus it will be seen that the question turns rather on the character of the act than on the relations of the employes to each other. If the act is one done in the discharge of some POSITIVE DUTY of the master to the servant, then negligence in the act is the negligence of the master, but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

Baltimore & O. R. Co. vs. Baugh, 149 U. S. 368; 13 Sup. Ct. Rep. 914.

The above is quoted with approval in *Conroy vs. N. E. Ry. Co.,* 175 U. S. 323.

And this duty of the master is a continuing one and not satisfied by simply giving one set of orders.

Santa Fe Pacific Ry. Co. vs. Laurette Holmes, 202 U. S. 438, 26 Sup. Court Rep. 676,

a case of a railway engineer being injured by a head-on collision which would not have occurred if the train hav-

ing the right of way had not passed a station six minutes ahead of schedule time, as fixed by special orders from the train despatcher, in which our Supreme Court held that the employe may hold the railway accountable where the despatcher failed to issue orders to intercept the train at that point after being informed that it was two minutes ahead of time in passing at a point but a few miles away.

The rule of our State Court is stated in full in *Westerlund vs. Rothschild,* 53 Wash. 626:

"It was the duty of appellants to furnish respondent with a reasonably safe place in which to work, and to keep that place reasonably safe during the progress of the work. This duty was not confined alone to the place where respondent performed his work, but was extended to all the instrumentalities, machinery, and appliances which from the nature of the work directly affected the safety of the place. Such, then, being the duty of the appellants, failure to properly control the movement of the cable, by giving wrong signals, or acting without signals, while respondent was in a position of danger was negligence, irrespective of the men or means employed for that purpose. Being a DUTY IMPOSED BY LAW upon the appellants, such duty could not be delegated to others, whether co-employees of the respondent or not, so as to relieve appellants from liability for their failure to properly perform this duty (*McDonough vs. Great Northern R. Co.,* 15 Wash. 244). The person selected by appellants to give the signals controlling the proper movement of the cable was, in giving the signal, performing the appellant's duty, and his negligence, if any was the negligence of appellants (*Sroufe vs. Moran Bros.,* 28 Wash. 381). The doctrine of the above cases has been so frequently announced by this Court that it would seem to be no longer an open question in this state, and the citation of concurring cases, without further review is

sufficient."

That this has been the universal doctrine of our own State Court will be seen from the following:

Olson vs. Erickson, 53 Wash. 458.

Maloney vs. Stetson & Post Mill Co., 46 Wash. 645.

Hillis vs. Spokane & Inland Empire Co., 60 Wash. 7.

And it is so even if the injury was caused by acts of a fellow servant if there was concurrent negligence on the part of the master.

Hough vs. Railway Co., 100 U. S. 213.

CONTRIBUTORY NEGLIGENCE.

Learned counsel for plaintiff in error argues that defendant in error had an opportunity to avoid the danger. He says that Paul Haas testified that he heard the bumping of the cars. Paul Haas' testimony is that he heard the bumping and at that moment looked up and saw Schoeffler laid out. Broback says that he heard a crash. It is a matter of common knowledge that cars move quickly, and with the testimony of Broback (Record, p. 22) it can be seen that these cars were sent in with a speed that was even more than ordinary. Schoeffler says that when he started to cross, the cars were stationery. As he crossed the crash came, bearing him under the cars. Under the circumstances the negligence of the defendant in error is plainly for the jury.

Thomas Well vs. Moran Bros., 55 Wash. 102.

Smith vs. Hewitt Lea Lbr. Co., 55 Wash. 358.

McKenzie vs. North Coast Colliery Co., 55 Wash. 495.

Sturgeon vs. Tacoma Eastern Ry. Co., 48 Wash. 367.

The trial judge gave a clear instruction to the jury on this point and the jury resolved this in favor of defendant in error. They are the judges of the evidence.

There being no error in the rulings of the lower Court, defendant in error respectfully prays that the judgment of the Circuit Court be affirmed.

RAY & DENNIS,

Attorneys for Defendant in Error.

4

No. 2040

United States
Circuit Court of Appeals
For the Ninth Circuit.

C. E. MITCHELL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Eastern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the Eastern District of Washington, Eastern Division.

No. 871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Names and Addresses of Attorneys of Record.

For the Plaintiff:

OSCAR CAIN, United States Attorney, and E. C. MACDONALD, Assistant United States Attorney, Federal Building, Spokane, Washington.

For the Defendant:

JOHN T. MULLIGAN, Peyton Block, FRANCIS D. ADAMS, Peyton Block, JOHN C. KLEBER, Old National Bank Building, and ALEX M. WINSTON, Ziegler Block, Spokane, Washington.

[Indictment.]

UNITED STATES OF AMERICA.

Eastern District of Washington, United States District Court.

April Term, 1911.

FIRST COUNT.

The Grand Jurors of the United States, chosen, selected and sworn in and for the Eastern District of

Washington, upon their oaths present:

That C. E. Mitchell, late of the County of Spokane, State of Washington, Eastern District of Washington, before and at the time of the committing of the offence hereinafter mentioned at Spokane, in the district aforesaid, and within the jurisdiction of this Court, had devised a scheme and artifice to defraud divers other persons, whose names are to the Grand Jurors unknown, being all such persons as could or might be induced, by means of said scheme and artifice, and the representations hereinafter set forth, and with whom he might get into communication, intending in the executing and carrying out of said scheme and artifice to defraud to open and conduct a correspondence by means of the postoffice establishment of the United States with such divers other persons as aforesaid, as well as with the agents and employees engaged, employed and directed by the said C. E. Mitchell, and to incite and induce such divers other persons by such means, and by means of advertisements, printed circulars, letters, reports and telegrams sent and to be sent by and through the mails of the United States, and by personal solicitation by himself, his agents and employees directed by him, and by whatever other means might occur to him as most practicable and feasible for the inciting and inducing of all of such persons who might or could be so induced, to become purchasers of the capital stock in the various corporations hereinafter mentioned, in effecting and carrying out said scheme and artifice to defraud, to open correspondence with him, the said C. E. Mitchell, and with The C. E. Mitchell

Company, a corporation to be organized, conducted and controlled by the said [1*] C. E. Mitchell in connection with, and as a part of, the said scheme and artifice to defraud so devised by him, which said scheme and artifice to defraud so devised by the said C. E. Mitchell was that he, the said C. E. Mitchell, would cause to be incorporated and organized a corporation, and which said corporation was organized and was controlled and directed by him, and was known and styled The C. E. Mitchell Company, the alleged purpose of said corporation to be that of "buying, selling and operating of mines, quarries, mills, stores and conducting a general brokerage business in stocks," of which said corporation he, the said C. E. Mitchell, would be and did represent himself to be the president, and in the furtherance of said scheme and artifice so devised by him to secure the incorporation of various other companies to be organized and incorporated to conduct a mining business, and to secure from them and from other companies organized to conduct a mining business, stock, which he, the said C. E. Mitchell, intended, as a part of the said scheme and artifice to defraud devised by him, to sell and dispose of, by means of the false and fraudulent representations hereinafter set forth; that in carrying out and effecting said scheme and artifice to defraud so devised by him, the said C. E. Mitchell intended to and did personally and in the name of The C. E. Mitchell Company, advertise, represent and pretend that it, The C. E. Mitchell Company, was the fiscal and selling agent of the stock

*Page number appearing at foot of page of original certified Record.

of various companies, among others being the following, to wit: The Coeur d'Alene Eagle Mining Company; East Snowstorm Mining Company; the Coeur d'Alene Reliance Mining Company; the Montana Mammoth Mining Company; the Lee Jumbo Mining Company; the Kennedy Creek Gold Mining Company; the German American Mining Company; the Belding's Prospecting Syndicate and Columbia River Marble Company; that said C. E. Mitchell intended to and did, in furtherance of said scheme and artifice to defraud, represent and pretend that he personally and in the name of the said The C. E. Mitchell Company, had knowledge and at first hand of the actual present and prospective value of [2] the properties and assets of said various companies, their development and progress, and that the development of the properties of said various companies was under the control and direction of said C. E. Mitchell and said The C. E. Mitchell Company, to advertise and by means of said advertisements, circulars, reports and letters sent and to be sent by him and by his direction through the mails of the United States, and by his personal representatives, agents and employees, representing, stating and setting forth that the stock of the said various companies so organized and controlled as aforesaid, was of great value and would become of still greater value; that the properties owned by the said various companies were of great value and would become of still greater value, and that said companies had ore that could be shipped in paying quantities, and that the stock of the said various companies was being offered for sale

to secure funds to develop and equip the said properties, and that the proceeds from the sale of all stock of said companies were to be used to develop and equip the said properties, and that the stock of said respective companies would greatly enhance in value, and that said companies would pay dividends, thereby to induce and incite such divers other persons throughout the United States to enter into correspondence and communication by means of the postoffice establishment of the United States with the said The C. E. Mitchell Company, of Spokane, Washington, and to induce such divers other persons to buy stock in said corporations, he, the said C. E. Mitchell, well knowing that all of the aforesaid representations so made by him and by and in the name of The C. E. Mitchell Company under his direction, were misleading, false, untrue and fraudulent, and that the stock of the said various companies was not of the value so represented and would not increase in value and become of still greater value, and that the properties of the said various corporations were not of the value so represented and would not become of greater value, and that said companies did not have ore capable of being shipped in paying quantities, and that the corporations would not pay [3] dividends; that the proceeds from the sale of the stocks of said companies would not be used to develop the properties of the said companies, but that the same would be, and it was intended by the said C. E. Mitchell, that a large part of the proceeds from the sale of the stock of the said various companies would be by him fraudulently converted to his own use, and

it was the intent of the said C. E. Mitchell to fraudulently convert the moneys so obtained, or a large portion thereof, to his own use, which said scheme and artifice to defraud, devised by the said C. E. Mitchell, was to be effected by opening correspondence and communication by means of the postoffice establishment of the United States with such divers persons who might or could be induced to answer his advertisements and to whom might be addressed the many circulars, reports and letters so sent and to be sent through the mails of the United States by the said C. E. Mitchell and The C. E. Mitchell Company, by his direction; the said divers persons being persons so intended by the said C. E. Mitchell to be defrauded by inciting and inducing them to open correspondence with him, the said C. E. Mitchell and with The C. E. Mitchell Company; and that the said C. E. Mitchell then having devised said scheme and artifice to defraud as aforesaid, in and for executing the said scheme and artifice to defraud did, on or about the ninth day of May, one thousand nine hundred and seven, unlawfully deposit and cause to be deposited in the postoffice of the United States, in the City of Spokane, Spokane County, Washington, a certain letter addressed to Dr. O. F. Roberts, Atlanta, Neb., as follows, to wit:

THE C. E. MITCHELL COMPANY.
MINERS.

Box. 1848. Spokane, Washington. 5/9/07.

OUR PLATFORM:

Every shareholder is entitled to know all that any officer knows, at any time, about his mine.

Publish the facts, whether good, bad or indifferent.

Mine the mine.

Now.

From the General Office 300 to 322 Columbia Building. **[4]**

THE HOME OFFICE:

300 to 322 Columbia Building. C. E. Mitchell, President and Manager. Teresa M. Wagner Treasurer. Phone 1786. Spokane, Wash.

PACIFIC COAST HEADQUARTERS:

424–5 H. W. Hellman Bldg., Los Angeles, California. In charge of R. H. Dunn, Secretary and Sales Mgr.

WALLACE HEADQUARTERS:

State Bank of Commerce Building, Wallace, Idaho. In charge of John H. Scrafford, Mgr. of Mines for the Company.

MID-WEST HEADQUARTERS:

618–20 Railway Exchange Bldg., Milwaukee, Wisconsin. In charge of R. A. Rodrick, Vice-Pres. and Manager.

EASTERN HEADQUARTERS:

411 Betz Building, Philadelphia. In charge of Lieut. H. C. Seymour, Vice-President and Eastern Manager.

NEW YORK STATE HEADQUARTERS:

522 Security Mutual Building, Binghamtown, N. Y. Herbert H. Wells, General Agent.

THE MINES:

East Snowstorm, Mullan, Idaho.
Coeur d'Alene Eagle, Lane, Idaho.
German-American, Osborn, Idaho.
Coeur d'Alene Reliance, Wallce, Idaho.
Blue Bell-Belcher, Belcher, Washington.
Lee Jumbo, Lee-Echo Camp, Nev.

QUARRIES:

Canyon Green Marble, Blue Creek, Washington.
Columbia River Marble, Bossburg, Washington.

CODES:

Western Union.
Clough's.

Bank references given upon request.

INSPECTION INVITED.

Dr. O. F. Roberts,
Atlanta, Neb.

Dear Sir:

We want you in with us at the start to sell Coeur d'Alene Reliance.

If we strike ore like the Black Cloud adjoining, the shares will rise to $1 or better.

We should strike it—we have the same vein.

Perhaps you have a lot of questions you would like to ask. We feel sure we can anticipate some of these. Enclosed we answer some questions most frequently asked us.

If you come with us into the Reliance mine, we will report to you every month the exact facts as to progress of the mine. You will never be kept in the dark. This will help you sell the shares. **[5]**

There is only a little of the stock going on at 10¢.

You will have to speak NOW if you intend to be in with us at the start on Coeur d'Alene Reliance.

This is our last offer. We shall not write you again. Do not let opportunity pass you this time. We pay the liberal commissio*n*er of 40%. If you had got in Black Cloud at this price, your dividends would now be more than 100% per annum on the amount invested. Reliance is the direct extension of Black Cloud—every bit as good a chance to make a great mine.

We want you in with us in "Square Mining."

Yours truly,

THE C. E. MITCHELL CO.,

C. E. MITCHELL;

contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

SECOND COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That C. E. Mitchell, late of the County of Spokane, State of Washington, in the Eastern District of Washington, before and at the time of the committing of the offence hereinafter mentioned, at Spokane, in the District aforesaid, and within the jurisdiction of this Court, had devised a scheme and artifice to defraud divers other persons, whose names are to the Grand Jurors unknown, being all such persons as could or might be induced, by means of said scheme and artifice, and by the means hereinafter set forth, and with whom he might get into communi-

cation, intending in the executing and carrying out of said scheme and artifice to defraud, to open and conduct correspondence by means of the postoffice establishment of the United States with such divers other persons as aforesaid, as well as with the agents and employees engaged, employed and directed by the said C. E. Mitchell, and to incite and induce such divers other persons, by such means and by means of advertisements, printed circulars, letters, reports and telegrams sent and to be sent by and through the mails of the United States, and by personal solicitation by himself, his agents and employees directed by him, and by whatever other means might occur to him as most practicable and feasible for the inciting and inducing of all such persons who might or could be so induced **[6]** to become purchasers of the capital stock of the various corporations mentioned in the first count of this indictment in effecting and carrying out said scheme and artifice to defraud, to open correspondence with him, the said C. E. Mitchell, and with The C. E. Mitchell Company, a corporation to be organized, conducted and controlled by the said C. E. Mitchell in connection with, and as a part of, the said scheme and artifice to defraud so devised by him, and which said scheme and artifice to defraud in this count mentioned was the same scheme mentioned and described in the first count of this indictment, and when so devised by said C. E. Mitchell was in substance and effect as set forth in the said first count, in that portion thereof which begins with the word "was" in the eleventh line from the top of the second page of this indictment, and proceeds thence continu-

ously to and including the word "aforesaid" in the thirteenth line from the top of the fifth page of this indictment, to which said indicated portion of said first count, the said Grand Jurors hereby refer for a description of said scheme and artifice to defraud. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. E. Mitchell then having devised said scheme and artifice to defraud as aforesaid, in and for executing the said scheme and artifice to defraud did, on or about the sixteenth day of July, one thousand nine hundred and seven, unlawfully deposit, and cause to be deposited, in the postoffice of the United States in the City of Spokane, Spokane County, Washington, a certain letter addressed to Mr. O. M. Welander, Clinton, Minn., as follows, to wit:

THE C. E. MITCHELL COMPANY.

MINERS.

Box 1848. Spokane, Washington. 7/16/07

OUR PLATFORM:

Every shareholder is entitled to know all that any officer knows, at any time, about his mine.
Publish the facts, whether good, bad or indifferent.
Mine the mine.
Now.

From the General Office 300 to 322 Columbia Building. **[7]**

THE HOME OFFICE:

300 to 323 Columbia Building, C. E. Mitchell, President and Manager. Teresa M. Wagner, Treasurer. Phone 1786. Spokane, Wash.

PACIFIC COAST HEADQUARTERS:

424–5 H. W. Hellman Bldg., Los Angeles, California. In charge of R. H. Dunn, Secretary and Sales Mgr.

WALLACE HEADQUARTERS:

State Bank of Commerce Building, Wallace, Idaho. In charge of John M. Scrafford, Mgr. of Mines for the Company.

MID-WEST HEADQUARTERS:

618–20 Railway Exchange Bldg., Milwaukee, Wisconsin. In charge of R. A. Rodrick, Vice-Pres. and Manager.

EASTERN HEADQUARTERS:

411 Betz Building, Philadelphia. In charge of Lieut. H. C. Seymour, Vice-President and Eastern Manager.

NEW YORK STATE HEADQUARTERS:

522 Security Mutual Building, Binghamton, N. Y. Herbert H. Wells, General Agent.

THE MINES:

East Snowstorm, Mullan, Idaho.
Coeur d'Alene Eagle, Lane, Idaho.
German-America Osburn, Idaho.
Coeur d'Alene, Reliance, Wallace, Idaho.
Blue Bell-Belcher, Belcher, Washington.
Lee Jumbo, Lee-Echo Camp, Nev.

QUARRIES:

Canyon Green Marble, Blue Creek, Washington.
Columbia River Marble, Bossburg, Washington.

CODES:

Western Union.

Clough's.

Bank references given upon request.

INSPECTION INVITED.

Mr. O. M. Welander,

Clinton, Minn.

Friend:

We have about 2,000 people interested with us as small shareholders in our mines. We believe we can say "friend," to every man and woman of them. Why? Because we hide nothing. We tell the facts. We report to our people—our associates—every month.

Here is the last Progress Report.

Did you ever see a more frank, wide open, clean-cut statement of the facts of a month's work?

Look at the report on East Snowstorm. There is a property developing rapidly into a profit payer. All experimental work is done. WE ARE WORKING EVERY DAY IN ORE. [8]

Risk is well nigh eliminated from this proposition. It is not yet a sure thing. No mine is until its ore reserves are fully blocked out. But the risk is almost a minus quantity in East Snowstorm. It is a great thing to FIND YOUR ORE AND STAY WITH IT.

We want you to take on a block of East Snowstorm at 35¢. The big Snowstorm mine, our neighbor on the same vein, pays $45,000 dividends monthly. Our ore is richer. We believe we shall rival the big

Snowstorm soon. We want you to take on some shares at 35¢ and we promise you to do all a miner may do to make East Snowstorm pay as well as the big Snowstorm does.

We believe we can do it. We believe in this stock. We believe we are offering you a big buy when we quote you this at 35¢. It may rise to $3, same as big Snowstorm has. The latter once sold as low as East Snowstorm now does. Will you come with us and share the profits?

You will like our way.

Sincerely,

C. E. MITCHELL;

contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

THIRD COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That C. E. Mitchell, late of the County of Spokane and State of Washington, in the Eastern District of Washington, before and at the time of the committing of the offence hereinafter mentioned, at Spokane, in the District aforesaid, and within the jurisdiction of this Court, had devised a scheme and artifice to defraud divers other persons, whose names are to the Grand Jurors unknown, being all such persons as could or might be induced, by means of said scheme and artifice, and by the means hereinafter set forth, and with whom he might get into communication, intending in the executing and carrying out of said scheme and artifice to defraud, to open and conduct

correspondence by means of the postoffice establishment of the United States with such divers other persons as aforesaid, as well as with the agents and employees engaged, employed and directed by the said C. E. Mitchell, and to incite and induce such divers other persons, by such means and by means of advertisements, printed circulars, letters, reports and telegrams sent and to be sent by and through the mails of the [9] United States, and by personal solicitation by himself, his agents and employees directed by him, and by whatever other means might occur to him as most practicable and feasible for the inciting and inducing of all such persons who might or could be so induced to become purchasers of the capital stock of the various corporations mentioned in the first count of this indictment in effecting and carrying out said scheme and artifice to defraud, to open correspondence with him, the said C. E. Mitchell, and with The C. E. Mitchell Company, a corporation to be organized, conducted and controlled by the said C. E. Mitchell in connection with, and as a part of, the said scheme and artifice to defraud so devised by him, and which said scheme and artifice to defraud in this count mentioned was the same scheme mentioned and described in the first count of this indictment, and when so devised by said C. E. Mitchell was in substance and effect as set forth in the said first count, in that portion thereof which begins with the word "was" in the eleventh line from the top of the second page of this indictment, and proceeds thence continuously to and including the word "aforesaid" in the thirteenth line from the top

of the fifth page of this indictment, to which said indicated portion of said first count, the said Grand Jurors hereby refer for a description of said scheme and artifice to defraud. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said C. E. Mitchell then having devised said scheme and artifice to defraud as aforesaid, in and for executing the said scheme and artifice to defraud did, on or about the fourteenth day of October, one thousand nine hundred and seven, unlawfully deposit, and cause to be deposited, in the postoffice of the United States in the City of Spokane, Spokane County, Washington, a certain letter addressed to Mr. C. A. Bulduc, 53 Fraley St., Kane, Pa., as follows, to wit: **[10]**

THE C. E. MITCHELL CO.
MINERS.

General Offices, 300–323 Columbia Bldg.
P. O. Box 1848.
Spokane, Washington. 10/14/07.

OUR PLATFORM:

Every shareholder is entitled to know all that any officer knows, at any time, about his mine.
Publish the facts, whether good, bad or indifferent.
Mine the mine.
Now.

THE HOME OFFICE:

300 to 323 Columbia Building. C. E. Mitchell, President and Manager. R. H. Dunn, Secretary and Sales Mgr. P. G. Morgan, Treasurer. Phone 1786. Spokane, Washington.

MID-WEST HEADQUARTERS:

618 and 620 Railway Exchange Building, Milwaukee, Wisconsin. In charge of R. A. Rodrick, Vice-President and Manager.

EASTERN HEADQUARTERS:

411 Betz Building, Philadelphia, Pa., R. D. Fisk, General Agent.

NEW YORK STATE HEADQUARTERS:

522 Security Mutual Building, Binghamton, New York. Herbert H. Wells, General Agent.

IDAHO HEADQUARTERS:

Wallace, Idaho. In charge of John M. Scrafford, Manager of Mines for the Company.

OHIO HEADQUARTERS:

Will open in October at Columbus. In charge of J. C. Gregory, General Agent.

THE MINES:

East Snowstorm, Mullan, Idaho.
Coeur d'Alene Eagle, Lane, Idaho.
German-American, Osburn, Idaho.
Coeur d'Alene Reliance, Wallace, Idaho.
Blue Bell-Belcher, Belcher, Washington.
Lee Jumbo, Lee-Echo Camp, Nevada.
Montana Mammoth, Thompson Falls, Mont.

QUARRIES:

Canyon Green Marble, Blue Creek, Washington.
Columbia River Marble, Bossburg, Washington.

CODES:

Western Union.
Clough's.

Bank references given upon request.

INSPECTION INVITED. **[11]**

Mr. C. A. Bulduc,

Kane, Pa.

Dear Shareholder:

You are a shareholder with us in some of our operations.

You would not get this letter if you were not.

We want you to be with us in the first dividend paying mine we "bring in." In our opinion that one will be Montana Mammoth.

This great property has a gigantic vein. Prof. Aughey, who is spending ten days on the property, thor*o*ly examining every feature of it, says: "It reminds me much of the great Homestake Mine. I never examined a greater property."

We have issued a conservative, concise prospectus on Montana Mammoth. It tells the facts briefly. It does not give the long, technical reports of the engineers—those you may obtain by writing us. But you can depend absolutely upon the statements in this prospectus.

Because the vein i*n* 40 feet wide. Because the ore in sight is already abundant enough to run a 75 ton mill many months. And because we are hustling right now to get that mill built—for these good reasons we say we are confident that Montana Mammoth will quickly pay profits and the shares at 20¢ are the best bargain we have ever offered.

The shares are 20¢ now. At 20¢ today. As soon as we see the money for the mill all raised, the shares will be withdrawn from sale. So, if you want the

stock at 20¢, that is the price now. Not tomorrow—today.

You may take the shares on 10 months' instalments. Thus you watch us work while you pay. And you know we WORK, don't you?

Yours Truly,

THE C. E. MITCHELL CO.,
By C. E. MITCHELL.

contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

JOSEPH B. LINDSLEY,
United States Attorney.
C. A. MACMILLAN,
Assistant United States Attorney.

[Endorsements]: A True Bill. Geo. Urquhart, Foreman. Presented to the Court by the Foreman of the Grand Jury in Open Court, in the Presence of Grand Jury and filed in the United States District Court April 9, 1910. W. H. Hare, Clerk. **[12]**

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
C. E. MITCHELL,
Defendant.

Arraignment and Plea.

Now, on this 9th day of April, 1910, the above-named defendant, C. E. Mitchell, appeared in open

court in person, and the reading of the indictment heretofore returned against him by the Grand Jury was waived; and he being interrogated by the Court if he desired to enter a plea to the indictment, the said defendant thereupon said he desired to enter a plea of "Not Guilty" and gave bond in the sum of One Thousand ($1000.00) Dollars for his appearance in court.

Entered in Journal Number 2, Page 530. **[13]**

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Demurrer [to Indictment].

Comes now the defendant, C. E. Mitchell, and demurs to the first count of the indictment heretofore found against him, for the reason that the same does not state facts sufficient to constitute a crime or a violation of any law of the United States.

II.

Said defendant, C. E. Mitchell, demurs to the second count of the indictment heretofore found against him, for the reason that the same does not state facts sufficient to constitute a crime or violation of any law of the United States.

III.

Said defendant, C. E. Mitchell, demurs to the third count of the indictment heretofore found against him, for the reason that the same does not state facts sufficient to constitute a crime or violation of any law of the United States.

ALEX M. WINSTON,
NUZUM & NUZUM,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

I, Alex M. Winston, one of the attorneys for the defendant. do hereby certify that the foregoing demurrers, and each of them, are, in my opinion, well founded in law.

ALEX M. WINSTON,
One of the Attys. for Defendant.

[Endorsements]: Demurrer to Indictment. Filed in the U. S. District Court, Eastern District of Washington, April 7, 1911. W. H. Hare, Clerk. [14]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
C. E. MITCHELL,
Defendant.

Order Overruling Demurrer [to Indictment].

This cause came on April 7, 1911, for hearing on the Demurrer to the Indictment, and being duly con-

sidered by the Court, it is thereupon

ORDERED that the Demurrer to the Indictment be, and the same is hereby, overruled.

Entered in Journal Number 3, Page 19. **[15]**

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Motion [for Bill of Particulars].

Comes now C. E. Mitchell, defendant above named, and moves the Court for an order directing and commanding the Government to furnish him with a bill of particulars of the matters and things alleged in the indictment herein by setting out in said bill of particulars and by delivering to this defendant true copies thereof of all papers, letters, documents or writings of any kind or character upon which the Government intends to rely at the trial of this cause.

In case the foregoing motion is denied defendant moves the Court for an order ordering the Government to furnish the defendant with a schedule of said papers, documents and writings upon which it intends to rely and to give the defendant and his counsel an opportunity to inspect the same under such conditions as to the Court shall be deemed proper.

This motion is based on the filed records and pro-

ceedings herein, and the affidavit of C. E. Mitchell hereto attached and made a part hereof.

ALEX M. WINSTON,
NUZUM & NUZUM,
Attorneys for Defendant. [16]

State of Washington,
County of Spokane,—ss.

C. E. Mitchell, being first duly sworn, upon his oath deposes and says: That he is the defendant in the foregoing action; that the foregoing motion is made in good faith, and that it is necessary for him to have the information sought thereby in order that he may prepare for his defense herein; that the matters and things alleged in the indictment herein cover the United States from east to west and cover a long period of time, and that unless he has the information sought hereby, or the right of inspection of the documents referred to in the motion herein that he cannot safely go to trial, as he has been advised by his counsel, to whom he has made a full and fair statement of his defense herein, and that it is necessary that he have this information immediately in order that he may determine what witnesses he needs at the trial and procure their attendance at the trial, and that said documents have been available to the District Attorney in Spokane for at least a year.

Affiant further says that the Government has wholly failed to comply with the order of the Court directing the Government to permit the defendant and his counsel to inspect the aforesaid documents and has not given this defendant a list of the same, and that by reason thereof, this defendant has been

wholly unable to commence the preparation of his defense and will be unable to go to trial on the date the case is set for, unless this motion is granted forthwith and complied with by the Government.

C. E. MITCHELL.

Subscribed and sworn to before me this 20th day of April, 1911.

E. D. RAY,
Notary Public in and for the State of Washington, Residing at Spokane, Washington.

[Endorsements]: Motion for Bill of Particulars. Filed in the U. S. District Court, Eastern District of Washington. April 21, 1911. W. H. Hare, Clerk. [17]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

No. 871.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. E. MITCHELL,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find the defendant "Guilty" as to first count, "Guilty" as to second count, and "Guilty" as to third count in the Indictment.

WM. GEMMILL,
Foreman.

[Endorsements]: Verdict. Filed May 10, 1911. W. H. Hare, Clerk. [18]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Motion for New Trial.

Comes now the above-named defendant and moves that the verdict herein rendered be vacated and a new trial awarded for the following reasons:

I.

Irregularity in the proceedings of the Court, jury and adverse party, and an abuse of the discretion of the Court by which the defendant was prevented from having a fair trial, in this: The Court denied defendant's motion for a bill of particulars or for an inspection of the papers on which the Government relied for its conviction, which prevented the defendant from being able to properly prepare for trial.

II.

Misconduct in that the jury did not consider the exhibits, written testimony admitted in evidence, and which they were instructed to consider before the finding of their verdict.

III.

Accident and surprise which ordinary prudence could not have guarded against.

IV.

Insufficiency of the evidence to justify the verdict in this: There was no evidence to show the entering into the scheme or device by the C. E. Mitchell Company prior to the commencing of the using of the mails, or that the scheme or device so entered into was a scheme to defraud. There was no evidence that the said C. E. Mitchell did not rely *y*pon the reports of the engineers as to the facts set out in his letters, and the reports of those [19] engineers justified the reports made by Mr. Mitchell.

V.

Error in law occurring at the trial and excepted to at the time by the defendant in this: Admission in evidence of letters showing transactions that occurred more than three years from the date of the filing of the indictment and especially that with reference to the Columbia River Marble Company and the letter with reference to the U. S. Marble Company written to Needy, and all reference to any transactions occurring outside of the statute of limitations.

The Court further erred in its instructions giving its reason for admitting the testimony of transactions outside of the *statute limitations* in that they were misleading to the jury and they assumed that those transactions were not lawful; and the Court further erred in its instructions in stating that it was practically admitted that two elements of the offense had been committed, that is, the use of the mails with the three letters and the general use of the mails by the defendant. This error was because of the

later instruction when the Court instructed the jury that the finding of guilty on any one of the three things was sufficient, misleading the jury into believing that any one of the three elements of the crime was sufficient, when the instruction should have been more explicit; that the finding of guilty on sending any one of the three letters was sufficient.

This motion will be based upon the pleadings, the exhibits on file, the minutes of the court, the clerk's minutes and the transcript of the shorthand notes.

A. M. WINSTON and
NUZUM & NUZUM,
Attorneys for Defendant.

[Endorsements]: Service of the Within ——— is hereby acknowledged this —— day of ———, 1911.

OSCAR CAIN.

Motion for New Trial. Filed in the U. S. District Court, Eastern District of Washington. May 19, 1911. W. H. Hare, Clerk. [20]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
C. E. MITCHELL,
Defendant.

Judgment.

Now, on this 20th day of June, A. D. 1911, the above-named defendant, C. E. Mitchell, appeared in

open court in person, accompanied by his attorney, J. C. Kleber, and being informed of his conviction, heretofore of record, and being interrogated by the Court, if he had any legal cause to offer at this time why the judgment of the Court should not be pronounced, the defendant addressed the Court in his own behalf, and his attorney J. C. Kleber, addressed the Court at length in behalf of the defendant.

WHEREUPON, it is ordered by the Court that the said defendant, C. E. Mitchell, be imprisoned in the United States Penitentiary at McNeil's Island, State of Washington, for the period of one (1) year at hard labor, and to pay the cost of the prosecution, and to stand committed until costs are paid, and that the said defendant is now committed to the custody of the Marshal of the United States for the Eastern District of Washington, to carry this sentence into execution.

Entered in Judgment and Decree Register Number 2, Page 64. [21]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Motion in Arrest of Judgment.

Comes now the defendant, C. E. Mitchell, and applies to the Court for an order arresting the judg-

ment and sentence in the above-entitled cause for the following reasons appearing upon the fact of the record.

I.

That the Court has no jurisdiction of the person of the defendant;

II.

That the indictment does not charge facts sufficient to constitute a crime under Section 5480 of the Revised Statutes of the United States, as amended by the Act of March 2d, 1889, or any other statute.

JOHN T. MULLIGAN,
F. D. ADAMS,
JOHN C. KLEBER,
ALEX WINSTON,
Attorneys for Defendant.

[Endorsements]: Service of copy of within Motion admitted this 24th day of July, 1911.

OSCAR CAIN,
U. S. District Attorney.

Motion in Arrest of Judgment. Filed in the U. S. District Court, Eastern District of Washington. July 24, 1911. W. H. Hare, Clerk. [22]

[Petition and Amended Motion for New Trial and Affidavits in Support Thereof.]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

DEFENDANT'S PETITION AND AMENDED MOTION FOR NEW TRIAL.

Now comes the defendant, C. E. Mitchell, leave of Court first having been received, and files this his petition and amended motion for a new trial and applies to the Court to set aside and vacate the verdict, judgment and sentence, together with all orders heretofore made or entered in the above-entitled cause, and grant the defendant a new trial for the following reasons, to wit:

I.

Irregularity in the proceedings of the Court, jury and adverse party and the abuse of the discretion of the Court by which the defendant was prevented from having a fair trial, in this: That the Court denied the defendant's motion for a bill of particulars and for an inspection of the papers on which the Government relied for its conviction, which prevented the

defendant from being able to properly prepare for trial.

II.

Misconduct of the jury, in that: The jury did not consider the exhibits, written testimony admitted in evidence, and which they were instructed to consider before the finding of a verdict.

That the juror J. B. Carson had at the time of his acceptance as a juror a preconceived opinion against the defendant, and that said juror was opposed to, biased and prejudiced against the defendant at the time he was accepted as a juror, which facts he concealed by false and erroneous statements on his *voir dire* examination, as shown by the affidavit of D. A. Clement, which affidavit is attached to this motion and made a part hereof, [23] marked Exhibit "A"; also as shown by the affidavit of J. L. Ford, which said affidavit is marked Exhibit "B," attached to this motion and made a part hereof.

III.

Surprise and accident which ordinary prudence could not have guarded against in that: The Court, on application of the attorneys for the defendant decided that the prosecution should show to the defendant, or his attorneys, all the letters and documents which the Government would use at the trial in the above-entitled cause, and that thereafter the Court reversed said order, believing that he had exceeded his authority in making it. That the reversing of the order above referred to took place so near the day of the trial that it was impossible for the defendant to prepare his testimony to meet the evidence

introduced on behalf of the Government, by reason of the fact that he was uninformed as to the nature of the testimony that would be introduced, and the witnesses who could have been produced were beyond his reach and could not be produced at the trial in time to rebut the testimony introduced by the Government, all of which is more fully set out in the affidavit of C. E. Mitchell, hereto attached and made a part hereof, marked Exhibit "C."

That the defendant was further surprised by the admission of many letters and documents dated beyond the statute of limitations controlling criminal actions, many of which letters and documents referred to matters and things not charged in the indictment, as shown by said affidavit of C. E. Mitchell, marked Exhibit "C."

That defendant was further surprised by the admission by the Court of that certain letter which was admitted during the cross-examination of the defendant, being a letter written by defendant in the year 1904 to one George D. Needy, which said letter had been previously rejected by the Court when offered in evidence by the Government.

That the defendant was further surprised by the perjured **[24]** testimony of John L. Dwyer, as more fully set forth in the affidavits of C. E. Mitchell, John L. Dwyer, Wilbur L. Welch, S. G. Woolfey and Katherine Pigott, which affidavits are hereto attached and marked respectively Exhibit "C," Exhibit "D," Exhibit "E," Exhibit "F" and Exhibit "G."

That the defendant was further surprised by the perjured testimony of Von K. Wagner, as more fully

set forth in the affidavits of C. E. Mitchell, John L. Dwyer, Wilbur L. Welch, S. G. Woolfey and Katherine Pigott, which affidavits are hereto attached and marked respectively Exhibit "C," Exhibit "D," Exhibit "E," Exhibit "F" and Exhibit "G"; also the affidavit of E. C. Gove, attached hereto and made a part hereof, marked Exhibit "H."

IV.

Insufficiency of the evidence to justify the verdict in this: There was no evidence to show the entering into a scheme or artifice to defraud by the C. E. Mitchell Company prior to the commencement of the use of the mails, or that the scheme or artifice to defraud was in any manner connected with the C. E. Mitchell Company, or any of the companies mentioned in the indictment.

That there was no testimony showing, or tending to show that any person had been defrauded, or that any person had been deprived of money or property by the alleged representations as set forth in the indictment, or that anyone has been defrauded. That the testimony does not show, nor does it tend to show, that the defendant profited in any manner from any of the transactions complained of in the indictment.

There was no evidence showing, or tending to show, that the defendant did not rely upon the reports of the engineers as to the facts set forth in his letters, circulars and documents, and the reports of these engineers justify the reports made by the defendant.

That there was no evidence showing, or tending to show, that there was any intent to carry out by means of correspondence a scheme or artifice to defraud, nor is there any testimony showing, [25] or tending to show, that the defendant in carrying out the alleged scheme or artifice to defraud previously devised by him deposited letters in the postoffice of the United States.

V.

Error in law occurring at the trial, and duly excepted to at the time by the defendant, in this: Admission in evidence of letters showing transactions that occurred more than three years prior to the date of the filing of the indictment, and especially that with reference to the Columbia River Marble Company, and the letter in reference to the United States Marble Company written to Needy, and all reference to any and all transactions occurring more than three years prior to the filing of the indictment; also the admission of evidence tending to show other alleged fraudulent transactions of the defendant Mitchell.

Referring particularly to the instructions of the Court, the Court erred in giving the following instructions, to wit:

(a) "Under this section three matters of fact must be charged in the indictment and established by the evidence at the trial. First: That the defendant devised a scheme or artifice to defraud; second: That such scheme or artifice to defraud was to be effected by correspondence or communication with another person by means of the postoffice establishment of the United States, and, third, that in carry-

ing out such scheme or artifice to defraud the defendant deposited or caused to be deposited a letter in the postoffice of the United States.

These three elements are set forth in the indictment in this case, and the question for your determination is, are they established by the evidence. I do not understand that there is any substantial controversy as to the second and third elements of the crime here charged. It appears from the testimony without apparent contradiction, that the postoffice establishment of the United States was used extensively by the defendant for the purpose of promoting the business in which he was engaged, and there seems to be no question that he at all times intended to use it."

This instruction is misleading, confusing and does not correctly state the law, in this: The first and second elements under this instruction are so interwoven that the admission of the second element of the offense charged is an admission of the existence of the first element; the first and third elements under this instruction are also so interwoven that the admission of the third element is an admission of the existence of the first element, **[26]** so that when the Court instructed that there was no substantial controversy as to the second and third elements of the crime charged he, in effect, instructed the jury that there was no substantial controversy as to the guilt of the defendant. The Court transcended his powers in taking from the jury the second and third elements of the offense charged. The instruction assumes that the business in which the defendant was engaged

was the fraudulent scheme or artifice to defraud as set forth in the indictment, and further assumes that the mailing of a letter was sufficient to constitute the second and third elements above referred to in the instruction.

(b) "I will now revert to the first and most important element of the crime charged, namely, the devising of a scheme or artifice to defraud."

This instruction is misleading, confusing and does not correctly state the law, in this: That the gist of the offense is the use or attempted use of the United States mails for the forbidden purpose, and not the devising of the scheme or artifice to defraud, as charged. This instruction limits the balance of the instruction following to the one question, namely: The devising of a scheme or artifice to defraud.

(c) "For the purpose of these instructions I deem it sufficient to say that the scheme or artifice to defraud, devised by the defendant Mitchell as charged by the indictment, is substantially as follows:

That said Mitchell would cause to be incorporated the C. E. Mitchell Co., to be controlled and directed by him, for the alleged purpose of buying, selling and operating mines, quarries, mills, stores and conducting a general brokerage business in stocks; that said Mitchell would also secure the incorporation of the various other companies named in the indictment to conduct a mining business; that he would procure from such companies stocks which he would sell and dispose of by means of false and fraudulent representations, as set forth in the indictment; that he would represent and pretend that he had knowl-

edge at first hand of the actual, present and prospective value of the properties and assets of said various companies, their development and progress, and that the development of the properties of said various companies was under the control and direction of said C. E. Mitchell and said C. E. Mitchell Co.; that the stock of said various companies was of great value and would become of still greater value; that the properties owned by said various companies were of great value and would become of still greater value; that said companies had ore that could be shipped in paying quantities; that the stock of said companies was being offered for sale to secure funds to **[27]** develop and equip the said properties; that the proceeds from the sale of all stock of said companies were to be used to develop and equip said properties; that the stock of said respective companies would greatly enhance in value, and that said companies would pay dividends; that the said C. E. Mitchell well knew that all the aforesaid representations so made by him, and by and in the name of the C. E. Mitchell Co., under his direction were misleading, false, untrue and fraudulent; that the stock of said various companies was not of the value so represented and would not increase in value and become of greater value; that the properties of the said various corporations were not of the value so represented and would not become of greater value; that said companies did not have ore capable of being shipped in paying quantities, and that the corporations would not pay dividends; that the proceeds from the sale of the stock of said companies would

not be used to develop the properties of said companies, but the same would be, and it was intended by the said C. E. Mitchell that a large part of the proceeds from the sales of the stock of said various companies would be by him fraudulently converted to his own use, and that it was the intent of the said C. E. Mitchell to fraudulently convert the money so obtained or a large portion thereof to his own use; which said scheme and artifice to defraud, devised by said Mitchell, was to be effected by opening correspondence and communication by means of the postoffice establishment of the United States with such divers persons as might or could be induced to answer his advertisements, and to whom might be addressed the many circulars, reports and letters so sent and to be sent through the mails of the United States by the said C. E. Mitchell and the C. E. Mitchell Co. by his directions; and that in and for executing the said scheme and artifice to defraud the said Mitchell did unlawfully deposit and cause to be deposited in the postoffice of the United States, in the city of Spokane, Spokane County, Washington, the three certain letters set forth in the three counts of the indictment."

This instruction is erroneous, ambiguous, confusing and misleading, and is not a correct or proper summary or synopsis of the charging part of the indictment, in this: The indictment charges that C. E. Mitchell had devised a scheme or artifice to defraud; intending in the execution and carrying out of said scheme and artifice to defraud to open and conduct correspondence by means of the postoffice establish-

ment of the United States. The indictment then sets out the method of procedure resorted to by the said C. E. Mitchell in the executing and carrying out of the scheme and artifice to defraud—(as found by them in the indictment to have been in existence), the various steps alleged to have been taken by the said C. E. Mitchell in the consummation and carrying out of said alleged scheme or artifice to defraud. On the other hand, the instructions instruct the jury that the charging part of the indictment relates to the devising of a scheme or artifice to [28] defraud.

The instructions are confusing in this, that: No distinction is made between the alleged false representations made by C. E. Mitchell and those alleged to have been made by The C. E. Mitchell Company. The indictment charges that certain alleged misrepresentations were made by the said C. E. Mitchell, while other alleged misrepresentations are alleged to have been made by The C. E. Mitchell Company, but in the instruction above given the Court has failed to differentiate between these alleged misrepresentations as alleged to have been made by The C. E. Mitchell Company and those alleged to have been made by C. E. Mitchell, and charges all of said alleged misrepresentations as being the misrepresentations of C. E. Mitchell.

The instruction charges that "said Mitchell would cause to be incorporated the C. E. Mitchell Co., to be controlled and directed by him, for the alleged purpose of buying, selling and operating mines, quarries, mills, stores and conducting a general brokerage

business in stocks; that said Mitchell would also secure the incorporation of the various other companies named in the indictment to conduct a mining business; that he would represent and pretend that he had knowledge at first hand of the actual, present and prospective value of the properties and assets of said various companies, their development and progress, and that the development of the properties of said various companies was under the control and direction of said C. E. Mitchell and said C. E. Mitchell Co., * * * ," and then charges "that the said C. E. Mitchell well knew that all the aforesaid representations so made by him, and by and in the name of the C. E. Mitchell Co., under his direction, were misleading, false, untrue and fraudulent."

The indictment does not charge that the representations that "Mitchell would cause to be incorporated the C. E. Mitchell Co., to be controlled and directed by him for the alleged *pru*pose of buying, selling and operating mines, quarries, mills, stores and conducting a general brokerage business in stock" was a false **[29]** representation, nor does the indictment charge that the representation "that said Mitchell would also secure the incorporation of various other companies, named in the indictment, to conduct a mining business" was a false representation. On the contrary, the indictment specifically charges that these acts were done in executing and carrying out the scheme and artifice to defraud.

The same is true of the representation "that he would represent and pretend that he had knowledge at first hand of the actual, present and prospective

value of the properties and assets of the said various companies, their development and progress," and "that the development of the properties of said various companies was under the control and direction of the said C. E. Mitchell and the said C. E. Mitchell Co."

(d) "Now, gentlemen of the jury, if you are satisfied from the testimony in this case, beyond a reasonable doubt, that the defendant made one or more of the false representations charged in the indictment, in the sale of the mining stock therein described, and that such false representations were so made in pursuance of a scheme or artifice to defraud previously devised by the defendant, which was to be effected by correspondence or communication with another person by means of the postoffice establishment of the United States and that in and for executing such scheme or artifice, the defendant deposited in the postoffice of the United States the several letters described in the different counts of the indictment, you will find the defendant guilty as charged."

This instruction is misleading, ambiguous and does not correctly state the law, in that the jury is told that if the defendant made one or more of the false representations charged in the indictment in the sale of the mining stock therein described that they may find him guilty. This is especially objectionable when considered with the instructions immediately preceding this instruction. The last three instructions taken together are misleading, confusing, ambiguous and do not correctly state the law, when considered separately or together.

(e) "Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows resort to circumstances as a means of ascertaining the truth. And in such cases great latitude is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence but also supplying protection against imposition. Whenever the necessity arises for a [30] resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored for the reason that the force and effect of circumstantial facts usually and almost necessarily depends upon their connection with each other. Circumstances altogether inconclusive if separately considered may, by their number and joint operation, established or corroborated by minor coincidences, be sufficient to constitute conclusive proof."

This instruction is misleading, ambiguous and does not correctly state the law as applied to the facts in this case.

(f) "The case of fraud, as here stated, is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge."

This instruction is misleading and does not correctly state the law applicable to this case.

(g) "Before you can find the defendant guilty, therefore, you must find that the offense was com-

mitted within the three years next preceding the return of the indictment. It is not necessary, however, that the Government should prove that the scheme or artifice to defraud was devised within three years. If you find that such a scheme or artifice was devised more than three years prior to the return of the indictment, but that the scheme or artifice was still in existence and the defendant was operating under it within the three years, the case is still without the statute of limitations and may be prosecuted. It was for this purpose that certain letters were received in evidence which were written more than three years prior to the return of the indictment, and they can only be considered for the purpose of enabling you to determine whether or not there was in fact a scheme or artifice to defraud."

This instruction was misleading, confusing and does not correctly state the law.

This motion is based upon the record, pleadings, and files of the above-entitled cause, also upon the affidavits of C. E. Mitchell, D. A. Clement, J. L. Ford, J. L. Dwyer, Wilbur L. Welch, Mrs. G. W. Wolfley, Kathrine Pigott, E. C. Gove, Perry G. Morgan, and the *voir dire* examination of J. B. Carson, which affidavits and examination are hereto attached and made a part of this motion.

JOHN T. MULLIGAN,
F. D. ADAMS,
JOHN C. KLEBER,
ALEX M. WINSTON,
NUSUM & NUSUM,
Attorneys for Defendant. **[31]**

Defendant's Exhibit "A."

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of D. A. Clement].

State of Washington,
County of Spokane,—ss.

D. A. Clement, being first duly sworn, on oath deposes and says: That he is now, and for more than twenty-two years has been a resident of the City of Spokane, Spokane County, Washington, and for more than five years has been well and personally acquainted with one J. B. Carson, being the same J. B. Carson who was accepted and sat as a juror in the case of the United States of America versus C. E. Mitchell, which case was tried at Spokane in the month of May, 1911, and joined in the verdict of guilty returned in that case. Affiant further says that he knows of his own knowledge that at the time said Carson was chosen and accepted as a juror in said cause, and for a long time prior thereto he had been and then was very much prejudiced and bitter against the mining brokerage business and persons engaged in the mining brokerage business and in the mining promotion business; that for more than five

years last past affiant has been on friendly terms with said Carson and has had many conversations with him regarding the mining business, mining brokerage business and the promotion of mining ventures generally, and in such conversations said Carson has always expressed himself very bitterly against the mining brokerage business and mining brokers and mining promoters generally; that sometime in the year 1909 he had a conversation with said Carson, wherein said Carson made the statement to this affiant that "all the mining promoters and mining brokers either ought to be in hell or in the penitentiary," and in said conversation **[32]** said Carson used many other and similar expressions to the above expression; that on or about December, 1910, in the City of Spokane said Carson again expressed in a conversation with this affiant his bitterness against mining brokers and mining promoters generally, using substantially the same language as used in the conversation above referred to; that in a conversation in December, 1910, he not only said that "all mining promoters and mining brokers ought to be in hell or in the penitentiary," but criticized severely the methods used by mining brokers and mining promoters generally, informing this affiant also that he had lost considerable sums by the representations of mining brokers.

That on or about May 12th, 1911, affiant met said Carson on the corner of Wall & Sprague Streets in the City of Spokane and had another conversation with him, relative to the verdict in the case above referred to, at which time and place a conversation

substantially as follows took place between the affiant and the said Carson. This affiant said to Carson substantially: "I see you got through the Mitchell case." And Carson replied—"Yes. It don't take me long to arrive at a verdict in a case of that kind. These fellows have foisted these propositions upon the people long enough and I think it is time to call a halt." Then I said—"That is certainly consistent with the conversation that you have had with me in reference to mining promoters heretofore." He said—"Yes. Those s—— of b———— should be stopped." Affiant further says that said Carson and he talked on the said 12th day of May, 1911, for some five or ten minutes, during which time said Carson continued to converse along the lines above indicated, at all times showing a preconceived judgment in the Mitchell case.

That affiant has no interest in any way, shape, or manner in said cause nor the outcome thereof.

D. A. CLEMENT.

Subscribed and sworn to before me this 27th day of May, 1911.

NEIL C. BARDSLEY. [33]

Before me, Neil C. Bardsley, a notary public in and for the State of Washington, residing at Spokane, personally appeared the above named D. A. Clement, to me known to be the same person described in and who executed the foregoing and within affidavit, and acknowledged to me that he made the same freely

and voluntarily and for the uses and purposes therein mentioned.

Dated May 27th, 1911.

[Notarial Seal] NEIL C. BARDSLEY,

Notary Public in and for the State of Washington, Residing at Spokane. **[34]**

Defendant's Exhibit "B."

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of J. L. Ford].

State of Washington,

County of Spokane,—ss.

J. L. Ford, being first duly sworn, on his oath says that he is now, and for about 14 years last past has been a resident of the City of Spokane; that he is personally acquainted with J. B. Carson, being the same J. B. Carson who was accepted and sat as a juror in the case of United States of America vs. C. E. Mitchell, said case being tried at Spokane, in the month of May, 1911; that he has been acquainted with said Carson for some four or five years last past.

That several years ago this affiant as a mining broker sold to said Carson certain mining stocks; that after the sale of said stocks the company in

which the stock was issued practically failed and the stock became worthless; that shortly thereafter said Carson became very much embittered against mining brokers and mining promoters and persons dealing in mining stock generally; that he has had a large number of conversations with said Carson in reference to these subjects in the last three years, and up to about the month of April, 1911; that in all these conversations said Carson condemned, in most vigorous language, mining brokers and mining promoters, and men engaged generally in mining business.

That it was a common occurrence in these conversations down to the month of April, 1911, for said Carson to use expressions substantially as follows: "These mining brokers and men engaged in the sale of mining stocks are common swindlers, and should be in the penitentiary," and "If I had my way they would **[35]** be in the penitentiary," and "I should like to help send some of them there"; that said Carson made the statements substantially as above quoted and many other and similar expressions to this affiant in various conversations in the City of Spokane, Spokane County, Washington, within the last three years, and up to about the month of April, 1911; that said Carson since the trial of said Mitchell, in May, 1911, has continued expressing himself against mining brokers and men engaged in the sale of mining stocks, in substantially the same manner as above quoted.

J. L. FORD.

Subscribed and sworn to before me this 30th day of June, 1911.

[Notarial Seal] NEIL C. BARDSLEY,
Notary Public for Washington, Residing at Spokane. **[36]**

Voir Dire Examination of J. B. Carson, Juror.

J. B. CARSON, after being duly sworn to answer questions touching his qualifications as a juror, testified as follows:

(By Mr. CAIN.)

Q. I did't catch your name. A. Carson.

Q. You live in the City of Spokane? A. Yes.

Q. How long have you lived here?

A. About 23 years, I think.

Q. Are you acquainted with Mr. Mitchell?

A. No, sir.

Q. Are you acquainted with any of his attorneys?

A. I know some of them by sight.

Q. Do you know anything about the facts in this case? A. No, sir, I think not.

Q. Have you ever been engaged in the mining business? A. I have to some extent.

Q. In what capacity?

A. Well, director in a couple of mines.

Q. Have you ever been engaged in the sale of mining stock?

A. Well, no, only just what was sold as—(inaudible).

Q. And are you still engaged and interested in those mines? A. Yes, sir.

Q. And do you know of anything growing out of

your interest in the mining business that would influence your verdict one way or the other at this time? A. No, sir.

Q. Have you any opinion or impression as to the guilt or innocence of Mr. Mitchell? A. No, sir.

Q. You know of no reason why you wouldn't be a fair and impartial juror? A. No.

Mr. CAIN.—Pass for cause. **[37]**

(By Mr. NUZUM.)

Q. What is your business, Mr. Carson?

A. I am a plastering contractor.

Q. You have lived in this city 23 years?

A. Will be this month.

Q. Have you ever heard anything about this case against Mr. Mitchell?

A. No, sir, I did not—just heard of it—don't know anything about the facts of it.

Q. You don't know anything about the facts in the case. Are you acquainted with any of the mining properties that I have mentioned to the other jurors?

A. I didn't catch them all but I don't think so—there was none sounded familiar.

Q. The Coeur d'Alene Eagle, the East Snowstorm, Coeur d'Alene Reliance, Montana Mammoth, Lee Jumbo, Kennedy Creek Gold Mining Company, the German American, Belding Prospecting Syndicate and Columbia River Marble Company—you have never been interested in those in any way?

A. No, sir.

Q. You never have had any business with Mr. Mitchell, have you? A. No, sir.

Q. Have you any prejudice against the mining business or mining brokerage business? A. No.

Q. Are you acquainted with any of the Postoffice Inspectors whose names I have mentioned?

A. I don't know—I am acquainted with Mr. (Ruker).

Q. Are you acquainted with Mr. Cain of Mr. Macdonald?

A. Just from meeting them here in court, that is all.

Q. Do you know of any reason why you can't try this case fairly and impartially?

A. No, sir. **[38]**

Q. And if chosen as a juror you will do so, will you? A. Yes, sir.

Mr. NUZUM.—Pass.

State of Washington,
County of Spokane,—ss.

C. E. Mitchell being first duly sworn on his oath says: That he was present and heard the examination of the juror J. B. Carson touching his qualifications as a juror; that he believes the foregoing questions and answers to be a true and correct copy of the questions and answers made upon his examination as a juror.

C. E. MITCHELL.

Subscribed and sworn to before me this 17th day of July, 1911.

[Notarial Seal] NEIL C. BARDSLEY,
Notary Public in and for the State of Washington,
Residing at Spokane. **[39]**

Defendant's Exhibit "C."

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of C. E. Mitchell].

C. E. Mitchell, being first duly sworn, on his oath deposes and says:

That he is the defendant in the above-entitled cause. That in the trial of said cause in the court aforesaid in the month of May, 1911, said trial resulted in a conviction of affiant; That affiant was taken by surprise and was deprived of an opportunity to properly prepare his case in the following particulars:

A. The Court first decided that the prosecution should show this affiant or his attorneys the letters and documents which the Government intended to use and introduce in evidence at the trial; that thereafter and shortly before the time set for trial this order was by the Court revoked; that affiant up to the time of the revocation of said order had depended almost wholly upon the order in ascertaining the nature and character of the testimony that would be used by the Government at the trial; that it was

impossible within the time that elapsed between the revocation of the order and the day set for trial to properly prepare his case for trial owing to the facts herein before stated.

B. This affiant was taken by surprise by the introduction of the various letters, circulars and documents introduced by the Government and was not in a position to rebut the letters, circulars and documents by reason of the facts herein before stated.

C. That affiant was further taken by surprise by the admission of certain letters and documents dated beyond the limits of the statute of limitations controlling criminal action. **[40]**

D. That affiant was further taken by surprise by the admission and introduction of that certain letter written by affiant in 1904 and addressed to one George D. Needy.

E. That affiant was further taken by surprise by the perjured testimony of the Government's witnesses as set forth and explained in the affidavits attached to the petition and amended motion for a new trial, especially as to the testimony of one John L. Dwyer.

F. Affiant was further taken by surprise by the testimony of V. K. Wagner regarding the shipment of Black Cloud ore as ore from the Coeur d'Alene Reliance Mine, said testimony being wholly false and, therefore, unexpected. Affiant further says that since the return of the verdict in the above-entitled case that he has been practically without funds to protect his legal rights; that shortly after

the return of said verdict one of his counsel who had charge of said cause was disabled in an automobile accident and is still confined to his bed; that by reason of these circumstances he has been compelled to collect the matter in the preparation of the motion for a new trial himself; that he endeavored to collect the different affidavits necessary and proper for him to secure a new trial by correspondence and the use of the mails; that some time about thirty days after the verdict was given in this case and at a time when there were in the mails sent to different parties several affidavits a fraud order was issued by the Government against this affiant and he has not been able since the issuance of said fraud order to receive mail through the postoffice of the United States; that the issuance of this fraud order at the time and under the circumstances has prevented this affiant from securing affidavits that he might have otherwise had and filed in support of his petition and amended motion for a new trial; affiant further says that if granted a new trial in this case that he will be able to produce witnesses rebutting completely every charge made in the indictment and establishing to the satisfaction of any jury his innocence.

C. E. MITCHELL. **[41]**

Subscribed and sworn to before me this 15th day of July, 1911.

[Notarial Seal] ERNEST M. FLOOD,
Notary Public in and for the State of Washington,
Residing in Spokane. **[42]**

Defendant's Exhibit "D."

Knowing that I have done C. E. Mitchell a severe wrong by my testimony in his recent trial, in the Federal Court, in the City of Spokane in the month of May, 1911, my conscience bids me to swear to the following facts.

1. That some of my testimony was framed up for me by V. K. Wagner; namely, to swear that it was at Wagner's request that I swear on the stand that C. E. Mitchell had offered me two hundred dollars and a ticket to Vancouver, so as to be out of the town at the time of the trial.

2. That he (Wagner) insisted that I swear that I brought Anaconda ore from my home and at Mitchell's directions sent it out through the mail labeled Montana Mammoth ore.

3. That I never seen Wagner bring any Black Cloud ore in Mitchell's office and send it out as Reliance ore, altho that he insisted that I testify that I did. I knew that these statements which I testified to were false but I was compelled to swear to them by V. K. Wagner, who threatened to expose me on a personal matter, which he claimed would cause my arrest and imprisonment. When I was called in the court room during the trial to testify I remarked, when going down the stairs, to Wagner that I would tell all the truth. He (Wagner) grabbed me by the arm and reminded me of his threat.

When I arrived in Spokane from Helena, Mont., I was turned over to the Post office inspectors,

who accused me of leaving town on Mitchell money. There was four or five of them in the room at the Federal Building. When I denied it I was called all kinds of names by the inspectors present for not admitting it. Mr. Morse, one of the inspectors in general almost insisted that I would say so anyway. When I refused I was taken back up to the marshal's office. In a few minutes V. K. Wagner came up and started trying to frighten me in to say what I was supposed to say. Mr. Morse came in while we were arguing and I wanted to make an affidavit of the whole truth but he (Morse) refused to [43] let me. Finally Wagner got to making offers. He was to take care of me during the trial and get me a good position as soon as it was over. I refused to answer him and he soon left. I was soon left alone with an officer, but Wagner and Morse soon returned. Wagner took me aside and told me I was going to be held without bonds. Then Morse told me that they had a serious charge against me but that I was not the man they were after. They were ready to let me go if I would say what Wagner said I knew. They had me so frightened that I consented and was let go. Every day during the trial at noon we would all meet in Wagner's office. Those being present were: V. K. Wagner and his wife, W. L. Welch, John M. Scrafford, A. Herman and myself. These were regular anti-Mitchell meetings; they discussed their evidence and what to tell. I can acknowledge some meetings as these were held before the trial.

This affidavit I have prepared of my own free will and accord, believing that it will right some of the things of the trial.

J. L. DWYER.

State of Washington,
County of Spokane,—ss.

Subscribed and sworn to before me this 27th day of June, 1911.

[Notarial Seal] JNO. C. CALLAHAN,
Notary Public. **[44]**

Defendant's Exhibit "E."

Affidavit [of Wilbur L. Welch].

Dominion of Canada,
Province of British Columbia,—ss.

Wilbur L. Welch, being first duly sworn, on his oath deposes and says:

That for many years last past he has been, and now is, acquainted with C. E. Mitchell, being the same C. E. Mitchell who was convicted in the City of Spokane, State of Washington, United States of America, for using the mails of the United States with intent to defraud; that affiant is the same Wilbur L. Welch who testified as one of the witnesses on behalf of the Government in said trial.

Affiant further says, that for several years he was associated with said Mitchell in his office in the City of Spokane and was familiar with several attacks made upon said C. E. Mitchell through inspectors Fullinwider and Morse of the Post Service and that he made two affidavits on behalf of said Mitchell in the hearings had at Washington, D. C.

That in 1910 by reason of his having had a disagreement with said Mitchell he left the employ of said Mitchell and for all time since said time has remained out of the employ of the said Mitchell.

That this affiant is well acquainted with Von K. Wagner, one of the witnesses for the Government in the above-mentioned case also J. M. Scrafford, and John Dwyer, also witnesses for the Government; that from 1910 up till the trial of said case he was in close communication with the above-mentioned Wagner and somewhat with the said Dwyer, and familiar with some of the plans and steps taken by them to secure a conviction of the said C. E. Mitchell; that the said Von K. Wagner stated in the presence of this affiant "That if Mitchell had let him (Wagner) alone, he would have let Mitchell alone, but since Mitchell did not leave him (Wagner) alone, he (Wagner) was going to show Mitchell that he (Wagner) [45] was a good fighter, and he (Wagner) was going after Mitchell"; that in pursuance of this threat the said Von K. Wagner held many private audiences and consultations with the said John Dwyer in the back room of 503 Kuhn Building in the city of Spokane, these audiences relating to the evidence to be given in the above-mentioned case, and that the said Wagner instructed this affiant "not to speak to Dwyer at all about this case even if he (affiant) met him (Dwyer) on the street," saying "I will handle Dwyer."

That the said Wagner was continually thinking up schemes with which to aid the prosecution in the conviction of Mitchell.

That Inspector Morse told this affiant that he had witnesses Perry Morgan and R. G. Dunn, who testified in the above-mentioned case "where they had to be good, Dunn because he was a partner of Mitchell, and Morgan because he had signed a false affidavit."

WILBUR L. WELCH.

Subscribed and sworn to before me this 12th day of June, 1911.

[Notarial Seal] W. F. BROUGHAM,
Notary Public in and for the Dominion of Canada in the Province of British Columbia, Residing at Vancouver. My commission is for life.

Dominion of Canada,
Province of British Columbia,—ss.

Wilbur L. Welch, being first duly sworn, on oath deposes and says: That he is the same Wilbur L. Welch as named in and who made and executed the above and foregoing affidavit; that he made and executed the same of his free and voluntary act and will, and acting under no duress of any kind; that he has read the same, knows the contents thereof, and believes the same to be true.

WILBUR L. WELCH.

Subscribed and sworn to before me this 12th day of June, 1911.

[Notarial Seal] W. F. BROUGHAM. [46]

Defendant's Exhibit "F."

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit of [Mrs. G. W. Wolfley].

Mrs. G. W. Wolfley, being first duly sworn, on her oath deposes and says:

That she is the same person who in the year 1907 came to Columbus, Ohio, as the duly appointed agent of the C. E. Mitchell Company, a corporation, in and for the State of Ohio; that at that time affiant's name was "Mrs. J. C. Gregory" and that under that name she assumed such agency and opened an office in Columbus, Ohio, for said company;

That affiant was the only woman acting as agent for said C. E. Mitchell Company in the State of Ohio, and that affiant continued to act as agent for said company until said company retired from business in the spring of 1909.

That affiant visited the property of the Montana Mammoth Mining Company in the autumn of 1907 and gathered a large quantity of samples of the silver-lead ore produced by that property and caused same to be shipped to affiant at Columbus, Ohio; that thereafter, from time to time affiant received from the C. E. Mitchell Company various shipments

of samples from said Montana Mammoth Mining Company's property, but that such samples were always of silver-lead ores and never of copper ore; that affiant has been informed that one John Dwyer testified in the recent trial of the above-entitled case that a certain sample of ore from a mine in Anaconda, Montana, was shipped to affiant by the C. E. Mitchell Company as a sample of Montana Mammoth ore, and affiant states that said statement is untrue and that if a sample of copper ore had been received by affiant as coming from Montana Mammoth mine, [47] it would have caused affiant to have made special note of it and to have inquired the reason for sending copper ore from a silver-lead property; and that no such thing ever occurred.

Affiant further states that she found ore abundant at the property of the Montana Mammoth Mining Company and that there was plenty of high grade silver-lead ore to supply samples and that no advantage could have accrued to the C. E. Mitchell Company from shipment of ore from any other property as a sample from Montana Mammoth.

In witness whereof affiant has hereunto set her hand and affixed her seal in the City of Columbus, County of Franklin, State of Ohio, this 12th day of June, A. D. 1911.

MRS. G. W. WOLFLEY. [Seal]

Affidavit [of E. C. Gove].

State of California,
County of Los Angeles,—ss.

E. C. Gove, being first duly sworn on his oath deposes and says that he has been a resident of Los Angeles, California, since the autumn of 1909 and that prior to that date he was a resident of Spokane, Washington, for 25 years; that during the entire year 1907 he officed with the C. E. Mitchell Company and had his desk in Room 322 of the Columbia Building in Spokane, Washington, and that said room was used by the C. E. Mitchell Company for the display of ore samples from the various properties operated by said company; and that V. K. Wagner had a desk in the same room and that John L. Dwyer was employed in the same room as office boy.

That affiant was familiar with the general course of business carried on by the C. E. Mitchell Company in said office and that he was especially familiar with the receipt and reshipment of the small lots of ore which the C. E. Mitchell Company obtained from the Black Cloud mine; that three such lots of ore were received in said office in the spring of 1907, and affiant saw all of the boxes after same were prepared for shipment of the said Black Cloud ore, and that said boxes were addressed to various agents of the C. E. Mitchell Company and that in each case the box was labeled with a printed label reading: "From the C. E. Mitchell Company, Spokane, Wash.," and that no label on any of said boxes or packages or ore shipments whatsoever contained any other com-

pany's name or anything else except the address of [51] the addressee; and that the name of the Coeur d'Alene Reliance Mining Company or mine was never put upon any such label, box or package.

That all shipments of ore samples were wrapped by said John L. Dwyer and that V. K. Wagner never assisted in wrapping, packing or preparing any such shipment, or any shipment whatever from said office.

That affiant was particularly interested in the Coeur d'Alene Reliance Mining Company on account of owning and selling many of its shares, and he therefore took a great interest in all the work of the C. E. Mitchell Company in connection therewith and gave particular attention to the said shipments of Black Cloud ore samples especially because affiant had brought to the office of the C. E. Mitchell Company the first sample of Black Cloud ore that was brought there. That affiant's desk stood alongside the table on which the ore shipments were packed and affiant thereby became familiar with the method of the C. E. Mitchell Company in sending out said ores as above described.

Affiant also states that he is familiar with the course of dealing of C. E. Mitchell through intimate business and social relations with him extending over the past fourteen years, and that said Mitchell always showed extraordinary care in sending out samples of ores in order that the recipient might be fully and truthfully informed *as their* nature and source.

E. C. GOVE.

Subscribed and sworn to before me this 10th day of July, A. D. 1911.

[Notarial Seal] M. A. FLEMING,

Notary Public for California, Residing in Los Angeles. [52]

Defendant's Exhibit "I."

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of Perry G. Morgan].

State of Washington,

County of Spokane,—ss.

Perry G. Morgan, being first duly sworn, on oath deposes and says: That he was a witness for the Government, summoned to attend the trial in the above-entitled cause, which was tried in the court aforesaid at the May Term, 1911; that said trial resulted in the conviction of the defendant; that he was in attendance at said trial on Wednesday morning, May 3d, 1911; that prior to the time of calling of John L. Dwyer to the witness-stand for the prosecution as a witness in said cause affiant was in conversation with said John L. Dwyer and Katherine Pigott; that said John L. Dwyer was discussing his arrest and detention by the Federal authorities and said that the Gov-

ernment wanted him very badly, as they had served two subpoenas upon him, and he drew them from his pocket, and showed them to affiant and said Katherine Pigott; that with said subpoenas was a telegram on a blank of the Western Union Telegraph Company; that this affiant asked Dwyer what the contents of said telegra*ph* was, and Dwyer said "Oh! that's a telegram and it is what is going to help the old man (meaning Mitchell) out when I get on the stand"; affiant further states that all of the actions and conversation of said Dwyer made to, or in the presence of affiant prior to said Dwyer's appearance on the witness-stand indicated his friendship for the defendant, and that affiant, having been connected with the C. E. Mitchell Company at the time when the said Dwyer was office boy in the employ of the C. E. Mitchell Company, and knowing the friendly relations existing [53] between the said Dwyer and the said C. E. Mitchell was surprised when the said John L. Dwyer testified adversely to the interests of said defendant, C. E. Mitchell, and especially in view of the fact that in divers conversation had by affiant with said Dwyer, said Dwyer had always indicated his confidence in the integrity and business uprightness of said Mitchell.

P. G. MORGAN.

Subscribed and sworn to before me this 15th day of July, 1911.

[Notarial Seal] JOHN C. KLEBER,
Notary Public in and for the State of Washington,
Residing at Spokane. [54]

State of Washington,
County of Spokane,—ss.

C. E. Mitchell, being first duly sworn, on oath deposes and says: That he is the petitioner named in the foregoing petition and amended motion for a new trial; that he has read the same, knows the contents thereof, and that the same is true, as he verily believes.

C. E. MITCHELL.

Subscribed and sworn to before me this 15th day of July, 1911.

[Notarial Seal] A. A. BARNETT,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Amended Motion and Petition for New Trial. Filed in the U. S. District Court, Eastern District of Washington. July 15, 1911. W. H. Hare, Clerk. [55]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. E. MITCHELL,
Defendant.

Order Overruling Motion for a New Trial.

This cause coming on to be heard on the 24th day

of July, 1911, upon the motion of the defendant for a new trial, and the same being duly considered by the Court, it is thereupon

ORDERED by the Court that said motion be, and the same is hereby, denied and exceptions allowed, and the defendant remanded to the custody of the Marshal of the United States for the Eastern District of Washington pending the issuing of a Writ of Error, and the bond on Writ of Error be fixed at the sum of Five Thousand ($5,000.00) Dollars.

Entered in Journal Number 3, Page 66. [56]

Defendant's Exhibit "B" [Original Affidavit of John L. Dwyer].

Knowing that I have done C. E. Mitchell a severe wrong by my testimony in his rescent trial, in the Federal Court, in the city of Spokane in the month of May 1911. My concience bids me to swear to the following facts. 1) That some of my testimony was fraimed up for me by V. K. Wagner namely, to swear that it was at ~~Mitchell~~ Wagners request that I swear on the stand that C. E. Mitchell had offered me two hundred dollars and a ticket to Vancouver so as to be out of the town at the time of the trial. 2) That he (Wagner) insisted that I swear that I brought Anaconda ore from my house and at Mitchell directions sent it out through the mail labeled Montana Mammoth ore.

3) That I never seen Wagner bring any Black Cloud ore in Mitchell's office and send it out as reliance ore. Altho that he insisted that [57] I tes-

tisfy that I did I knew that these statements which I testified to were false but I was compeled to swear to them by V. K. Wagner who threatened to expose me on a personal matter which he claimed would cause my arrest and imprisonment. When I was called in the court Room during the trial to testify I remarked, when going down the stairs, to Wagner (wagner) that I would tell all the truth, he grabbed me by the arm and reminded me of his ~~tret~~ threat.

4) When I arrived in Spokane from Helena mont. I was turned over to the Postoffice inspectors who accused me of leaving town on mitchell money. There was four or five of them in the room at the [58] Federal Bldg. When I denied it I was called all kinds of names by the inspectors present for not admitting it. Mr. Morse one of the inspectors in general almost insisted that I would say so any way. When I refused I was taken back up to the marshals office. In a few minutes V. K. Wagner came up and started trying to frighten me in to say what I was supposed to say. Mr. Morse came in while while we were arguing and I wanted to make an afidavit of the whole truth but he (morse) refused to let me. Finaly Wagner got to making offers he was to take care of me during the trial and get me a good position as soon as it was over I refused to answer him and he soon left I was soon left alone with an officer, but Wagner and Morse soon returned. Wagner took me I held aside and [59] told me ~~he~~ was going to ~~hold~~ ~~me~~

without bonds. Then Morse told me that they had a serious charge against me but that I was not the man they were after. ~~I~~ let they were redy me go if I would say what Wagner said I knew. They had me so frightened that I consented and was let go. Every day at noon we would all meet in Wagners office during ~~during~~ the trial those been present were: V. K. Wagner and his wife W. L. Welch. John M. Scrafford. A. Herman and my self. These were regular anti-Mitchell meetings; they discussed there evidence and what to tell. I can acknowledge some meetings as these were held before the trial. [60]

This affidavit I have prepaired of my own free will and accord. believing that it will ~~wrigh~~ right some of the things of the trial.

J. L. DWYER.

State of Washington,
County of Spokane,—ss.

Subscribed and sworn to before me this 27 day of June, 1911.

[Seal] JNO. C. CALLAHAN,
Notary Public. [61]

Defendant's Exhibit "E" [Original Affidavit of Wilbur L. Welch].

AFFIDAVIT.

Dominion of Canada,
Province of
British Columbia,—ss.

WILBUR L. WELCH, being first duly sworn, on his Oath deposes and says:

THAT for many years last past he has been, and now is, acquainted with C. E. Mitchell, being the same C. E. Mitchell who was convicted in the City of Spokane, State of Washington, United States of America, for using the Mails of the United States with intent to defraud; That affiant is the same Wilbur L. Welch who testified as one of the witnesses on behalf of the Government in said trial.

Affiant further says, that for several years he was associated with said Mitchell in his office in the City of Spokane and was familiar with several attacks made upon said C. E. Mitchell through Inspectors Fullinwider and Morse of the Post Service and that he made two Affidavits on behalf of said Mitchell in the hearings had at Washington D. C.

THAT in 1910 by reason of his having had a disagreement with said Mitchell he left the employ of said Mitchell and for all time since said time has remained out of the employ of the said Mitchell.

THAT this Affiant is well acquainted with Von K. Wagner one of the witnesses for the Government in the above mentioned case, also J. M. Scrafford, and

John Dwyer also witnesses for the Government; that from 1910 up till the trial of said case he was in close communication with the above mentioned Wagner and somewhat with the said Dwyer, and familiar with some of the plans and steps taken by them to secure a conviction of the said C. E. Mitchell; that the said Von K. Wagner stated in the presence of this Affiant "That if Mitchell had let him (Wagner) [62] "alone, he would have let Mitchell alone, but since "Mitchell did not leave him (Wagner) alone, he "(Wagner) was going to show Mitchell that he "(Wagner) was a good fighter, and he (Wagner) was "going after Mitchell"; that in pursuance of this threat the said Von K. Wagner held many private audiences and consultations with the said John Dwyer in the backroom of 503 Kuhn Building in the city of Spokane, these audiences relating to the evidence to be given in the above mentioned case, and that the said Wagner instructed this Affiant "not to "speak to Dwyer at all about this case even if he "(affiant) met him (Dwyer) on the street" saying "I will handle Dwyer."

THAT the said Wagner was continually thinking up schemes with which to aid the prosecution in the conviction of Mitchell.

THAT Inspector Morse told this affiant that he had witnesses Perry Morgan and R. H. Dunn, who testified in the above mentioned case, "where they had to be good" "Dunn because he was a partner of Mitchell' and Morgan because he had signed a false Affidavit."

WILBUR L. WELCH.

Subscribed and sworn to before me this 12th day of June, 1911.

[Seal] W. F. BROUGHAM,

Notary Public in and for the Dominion of Canada, in the Province of British Columbia, Residing at Vancouver. My Commission ~~expires. . . . . 191~~ is for life.

Dominion of Canada,
Province of
British Columbia,—ss.

Wilbur L. Welch, being duly sworn, on Oath deposes and says: That he is the same Wilbur L. Welch, as named in, and who made and executed the above and foregoing Affidavit; that he made and executed the same of his free and voluntary act and will, and acting under no duress of any kind; that he has read the same, knows the contents thereof, and believes the same to be true.

WILBUR L. WELCH.

Subscribed and sworn to before me this 12th day of June, 1911.

[Seal] W. F. BROUGHAM. [63]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of W. L. Clark].

United States of America,
Eastern District of Washington,
County of Spokane,—ss.

W. L. Clark, being first duly sworn, on oath deposes and says: I am the Auditor of the Spokane and Eastern Trust Company, Spokane, Washington; I have held such position for about two years past; in my duties I am required frequently to pass upon handwriting and signatures and have made a study of same; I have examined the signature attached to Exhibit "A," attached to the affidavit of Von K. Wagner, and the signatures attached to Exhibits 1, 2, 3, 4 and 5, attached to the affidavit of S. H. Morse. I have also examined the signature "Wilbur L. Welch" attached to the affidavit filed in support of the motion of C. E. Mitchell for a new trial in the above mentioned and entitled case, and in my opinion it is not the signature of W. L. Welch as shown on the papers known to have been signed by him and indicated above, and I am satisfied that the signature written on the affidavit referred to above was not written by the same person who wrote the signatures on the exhibits mentioned above. I have also examined the signatures of W. L. Welch on file in The Spokane and Eastern Trust Co., where W. L. Welch formerly carried an account and I am satisfied that the signature on the said affidavit is not the same as that on file in said Spokane and Eastern Trust Company, and undoubtedly a check signed as is the affidavit filed

in support of C. E. Mitchell's motion for a new trial, referred to above in this affidavit, would not be cashed by said Spokane and Eastern Trust [64] Company.

W. L. CLARK.

Subscribed and sworn to before me this 24th day of July, A. D. 1911.

[Notarial Seal] HARRY E. RICH,
Notary Public in and for the State of Washington, Residing at Spokane.

[Endorsements]: Affidavit of W. L. Clark. Filed July 24, 1911. W. H. Hare, Clerk. By F. C. Nash, Deputy. [65]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of M. M. Cook].

United States of America,
Eastern District of Washington,
County of Spokane,—ss.

M. M. Cook being first duly sworn, on oath deposes and says: I am the Cashier of the National Bank of Commerce in the City of Spokane; I have held such

position since November, 1909; I have known W. L. Welch for a number of years, and I am acquainted with his signature. I have examined the signature attached to Exhibit "A," attached to the affidavit of Von K. Wagner, and the signatures arrached to Exhibits 1, 2, 3, 4 and 5, attached to the affidavit of S. H. Morse, and in my opinion they are the signature of W. L. Welch. I have examined the signature of "Wilbur L. Welch" attached to the affidavit filed in support of the motion of C. E. Mitchell for a new trial in the above-entitled case, and in my opinion it is not the signature of W. L. Welch.

M. M. COOK.

Subscribed and sworn to before me this 24th day of July, A. D. 1911.

[Notarial Seal] JOSEPH BAILY,

Notary Public in and for the State of Washington, Residing at Spokane.

[Endorsements]: Affidavit of M. M. Cook. Filed July 24, 1911. W. H. Hare, Clerk. By F. C. Nash, Deputy. [66]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of H. C. Blair].

United States of America,
Eastern District of Washington,
County of Spokane,—ss.

H. C. Blair, being first duly sworn, on oath deposes and says: That I am manager and one of the proprietors of The Blair Business College in the City of Spokane, Washington. I have had thirty-two years' experience in the teaching of penmanship. During the last twenty years I have made a special study of forgery and of comparison of handwriting and have appeared in many cases in court where handwriting has been in dispute.

I have carefully compared the signature of W. L. Welch on Exhibit "A," attached to the affidavit of Von K. Wagner, and to Exhibits 1, 2, 3, 4 and 5, attached to the affidavit of Stephen H. Morse, with the signature of "Wilbur L. Welch" to the affidavit filed in this court and attached to the motion of C. E. Mitchell for a new trial in the above-entitled case, and it is my opinion that said signatures attached to said exhibits and the signature "Wilbur L. Welch" attached to said affidavit were not written by one and the same person.

H. C. BLAIR.

Subscribed and sworn to before me this 24th day of July, A. D. 1911.

[Notarial Seal] OSCAR CAIN,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Affidavit of H. C. Blair. Filed July 24, 1911. W. H. Hare, Clerk. By F. C. Nash, Deputy. [67]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of Stephen H. Morse].

United States of America,
Eastern District of Washington,
County of Spokane,—ss.

Stephen H. Morse, being first duly sworn, deposes and says: That I am a postoffice inspector, and was such inspector during all of the time of the investigation of the charges against C. E. Mitchell and at the time of his arrest and trial;

That I am acquainted with J. L. Dwyer, who was a witness in said trial. I had several conversations with him before the trial and I have read his affidavit filed in support of the motion of said C. E. Mitchell for a new trial; that the information that he had taken Anaconda ore from his father's home to the office of C. E. Mitchell and sent it out labeled Montana Mammoth ore was communicated to me by the said J. L. Dwyer without any threats or inducements what-

ever. This statement was made to me by him the first conversation I ever had with him. Von K. Wagner, who was a witness at said trial and whom Dwyer, in his affidavit, states induced him to make such statement was not present at the time. The statement in the affidavit of the said Dwyer "when I arrived in Spokane from Helena, Montana, I was turned over to the postoffice inspectors, who accused me of leaving town on Mitchell money. There was four or five of them in the room at the Federal Building when I denied it. I was called all kinds of names by the inspectors present for not admitting it. Mr. Morse, one of the inspectors in general almost insisted that I would say so anyway," is absolutely false. Said J. L. Dwyer was brought [68] into the postoffice inspector's office shortly after his return from Helena, Montana, there being present John Fullinwider, Inspectors Lucey, Webster, Welter and myself. There were no threats of any kind made toward him as said time; no one called him any names, nor was his testimony discussed in any manner. The only conversation that took place between Dwyer and the said inspectors was in relation to his getting bail. He asked permission to use the telephone to communicate with persons whom he said would go on his bond and such permission was granted him. I was present in the office of the United States Marshal during a portion of the conversation between said J. L. Dwyer and said Von K. Wagner; that at said conversation no threat was made by the said Wagner to the said Dwyer, and no

promise or inducement of any kind or character held out to said Dwyer. The statement in said affidavit that "Mr. Morse came in while we were arguing and I wanted to make an affidavit to the whole truth, but he, Morse, refused to let me," is absolutely false. No such conversation was had, and no offer was ever at any time made by the said Dwyer that he would make an affidavit in any way changing the affidavit which he had formerly made.

The further statement in said affidavit, to wit: that "then Morse told me they had a serious charge against me, but I was not the man they were after, they were ready to let me go if I would say what Wagner said I knew. They had me so frightened that I consented and was let go," is absolutely false; that no such conversation ever took place between myself and said J. L. Dwyer.

STEPHEN H. MORSE.

Subscribed and sworn to before me this 22d day of July, A. D. 1911.

[Notary Seal] OSCAR CAIN,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Affidavit of S. H. Morse. Filed July 24, 1911. W. H. Hare, Clerk. By F. C. Nash, Deputy. [69]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of Mae Engel].

United States of America,
Eastern District of Washington,
County of Spokane,—ss

May Engel, being first duly sworn, deposes and says: I am a sister of J. L. Dwyer, who was a witness in the case of the United States against C. E. Mitchell. I know that said J. L. Dwyer was in the employ of C. E. Mitchell several months prior to the time of Mitchell's arrest. I saw the said Dwyer frequently at and about the time of the Mitchell trial. One evening, at our home, during the trial, he told me that Mitchell had offered him a ticket to Vancouver and Two Hundred ($200.00) Dollars if he (Dwyer) would go to Vancouver, and that he refused it. He also told me that he would testify to nothing but the truth. I saw said Dwyer frequently during the trial and heard him discuss the case. He never made any complaint about being coerced into testifying by Postoffice Inspector Morse, V. K. Wagner, or anyone else, and never made any statement that anyone on behalf of the Government had made him any offer concerning his testimony.

I saw said Dwyer frequently at and about the 27th day of June, 1911, the time when his affidavit in support of Mitchell's motion for a new trial was signed. During that time he seemed to be in a dazed and stupified condition, as one might be who was laboring under the influence of some powerful drug. He told me at about that time that Mitchell wanted him to sign an affidavit, He said that he would not do it; that he testified to the truth at the trial, but that they kept worrying him by telling him that [70] his evidence had sent Mitchell to the penitentiary, and that he felt sorry for Mitchell's family.

Shortly after the 27th of June, 1911, the said J. L. Dwyer disappeared and I have not seen him since and have been unable to learn anything of his whereabouts.

MAE ENGLE.

Subscribed and sworn to before me this 22d day of July, A. D. 1911.

[Notarial Seal] OSCAR CAIN,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Affidavit of Mrs. Mae Engel. Filed July 24, 1911. W. H. Hare, Clerk. By F. C. Nash, Deputy. [71]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
C. E. MITCHELL,
Defendant.

Affidavit [of Margaret Dwyer].

United States of America,
Eastern District of Washington,
County of Spokane,—ss

Margaret Dwyer, being first duly sworn, deposes and says: I am the mother of J. L. Dwyer, who was a witness in the case of the United States against C. E. Mitchell. I know that prior to the arrest of said Mitchell, said J. L. Dwyer was in his employ for a number of months; that my husband is a miner and we have at our home a large collection of samples of ore collected from various mining properties in which my husband has been interested. I know that during the time said J. L. Dwyer was in the employ of said Mitchell, he took a sack full of the ore away from the house and told me that he was taking it to show to Mr. Mitchell. Afterwards I spoke of buying some stock in the Montana Mammoth Mining Company, one of the companies which The C. E. Mitchell Company was promoting. The said J. L. Dwyer at that time advised me not to purchase the stock, saying that the stock was no good and was not what it was

represented to be. This was before the arrest of C. E. Mitchell.

I saw the said J. L. Dwyer frequently during and about the time of the trial of C. E. Mitchell. He told me that he would swear to nothing but the truth. I know that during and about the time of the trial, one Cornish, who seemed greatly interested in the Mitchell case, was constantly attempting to get into communication with said J. L. Dwyer, and called at the home of my daughter, where the said J. L. Dwyer was stopping, two or **[72]** three times to make inquiries for him. That about the latter part of June calls over the telephone were frequently made at my home for the said J. L. Dwyer. He informed me that Mitchell was endeavoring to get him to make an affidavit concerning his testimony at the trial. About the evening of the 27th of June, 1911, someone called him over the telephone, and asked him to come down town. He went and did not return until about midnight. A day or two later he mysteriously disappeared and I have not been able to learn anything of his whereabouts since.

That at and about the 27th day of June, the said J. L. Dwyer seemed to be in a dazed and stupified condition, having the appearance of a person who might have been drugged. I talked with him several times at about this time and he did not seem to me to be in a normal condition mentally. The said J. L. Dwyer was nineteen years old last January.

MARGARET DWYER.

Subscribed and sworn to before me this 22d day of July, A. D. 1911.

[Notarial Seal] OSCAR CAIN,
Notary Public in and for the State of Washington, Residing at Spokane.

[Endorsements]: Affidavit of Mrs. Margaret Dwyer. Filed July 24, 1911. W. H. Hare, Clerk. By F. C. Nash, Deputy. **[73]**

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of W. D. Vincent].

United States of America,
Eastern District of Washington,
County of Spokane,—ss.

W. D. Vincent, being first duly sworn, on oath deposes and says: I am the cashier of the Old National Bank, of Spokane, Washington, and have been engaged in the banking business for the last twenty-five years, during which time I have made a special study of handwriting, both in actual practice for the bank and by reading and studying the best authorities on the subject. I have frequently qualified as

an expert in the State courts and consider myself competent to pass upon matters pertaining to handwriting.

I have carefully examined the signature of W. L. Welch attached to the Exhibits 1, 2, 3, 4 and 5 filed with the affidavit of S. H. Morse; also the signature to Exhibit "A" attached to the affidavit of Von K. Wagner filed in said case, and I have also examined and compared with said exhibits the signature of W. L. Welch appearing on the affidavit filed in the motion of C. E. Mitchell for a new trial in the above case, and I am positive that the signature on the exhibits referred to were not written by the same person who signed the affidavit filed in support of said motion for a new trial on behalf of said C. E. Mitchell.

W. L. Welch formerly carried an account with this bank and I am familiar with his writing and signature, and the signature "Wilbur L. Welch" appended to said affidavit in support of Mitchell's motion for a new trial, is not the signature of W. L. **[74]** Welch, and in my opinion was not written by him and is a forgery.

W. D. VINCENT.

Subscribed and sworn to before me this 24th day of July, A. D. 1911.

[Notarial Seal] OSCAR CAIN,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Affidavit of W. D. Vincent. Filed July 24, 1911. W. H. Hare, Clerk. By F. C. Nash, Deputy. **[75]**

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of J. B. Carson].

United States of America,
Eastern District of Washington,—ss.

J. B. Carson being first duly sworn, deposes and says: I am the J. B. Carson who was one of the jurors in the case of the United States vs. C. E. Mitchell. I have read the affidavit of D. A. Clement, and in response thereto desire to say, that prior to the trial of C. E. Mitchell, I had been and at the commencement of said trial, was a total stranger to said C. E. Mitchell. I knew nothing of him or his business methods, and did not even know that such a case was pending in this court; that I did not have, and have never had any bias, prejudice or ill-feeling toward legitimate mining, or legitimate mining promotion or brokerage business, and I have never, prior to nor since the trial of said C. E. Mitchell expressed any feeling, prejudice, or hostility toward legitimate mining business of any kind.

In regard to the statement contained in the affidavit of D. A. Clement "that for more than five years

last past affiant has been on friendly terms with said Carson and has had many conversations with him regarding the mining business, mining brokerage business, and the promotion of mining ventures generally, and in such conversations said Carson has always expressed himself very bitterly against the mining brokerage business and mining brokers and mining promoters generally," I desire to say that said statement is absolutely and entirely false; that I have not had frequent conversations during the past five years with the said D. A. Clement concerning the mining business or any other business. **[76]**

In regard to the statement that sometime in the year 1909, said Clement had a conversation with me, wherein I made the statement "All the mining promoters and mining brokers either ought to be in hell or in the penitentiary," I state that same is absolutely false, and that I never made that statement nor any statement of a similar kind or character to the said D. A. Clement. In regard to the statement that on or about December, 1910, in the city of Spokane I again expressed bitterness against the mining business and mining promoter generally, using substantially the same language used in former conversations, I desire to state that such statement is absolutely false and I never made same.

In regard to the statement in said affidavit that on or about May 12th, 1911, the said D. A. Clement and myself had a conversation in the City of Spokane relative to the verdict in the Mitchell case, in which he states that I said, "It don't take me long to arrive

at a verdict in a case of that kind," and "These fellows have foisted these propositions upon the people long enough, and I think it is time to call a halt," and that I further said "Yes, those sons of bitches should be stopped," I desire to say that the statements are absolutely false; that the statements set out in the said Clement's affidavit which he attributes to me were in substance made by the said Clement himself and I did not respond to them, or comment upon them.

I have also read the affidavit of J. L. Ford, attached to the defendant's motion for a new trial, and in regard to the statements therein contained to say that same are absolutely and unqualifiedly false, except that said Ford had sold me some mining stock; that I never said to J. L. Ford, or to anyone that "These mining brokers and men engaged in the sale of mining stocks are common swindlers, and should be in the penitentiary," and "I should like to help send them there," or used expressions of like import.

In regard to the statement in said affidavit of said Ford that he has conversed with me since the Mitchell trial, I [77] desire to state that I had but one conversation with him since said trial, which was substantially as follows: Ford asked me how we managed to reach such a verdict in the Mitchell case. I told him I thought the evidence warranted it. He then said that Mitchell was no worse than a lot of others. I said that was probably true, but we were not trying the others.

I desire to state further that in reaching a verdict

in the Mitchell case I was influenced entirely by the evidence and allowed no other consideration to move or influence me in the matter.

J. B. CARSON.

Subscribed and sworn to before me this 24th day of July, A. D. 1911.

OSCAR CAIN,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Affidavit of J. B. Carson. Filed July 24, 1911. W. H. Hare, Clerk. By F. C. Nash, Deputy. **[78]**

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. E. MITCHELL,
Defendant.

Affidavit [of Von K. Wagner].

United States of America,
Eastern District of Washington,—ss.

Von K. Wagner, being first duly sworn, upon his oath deposes and says: That I am the Von K. Wagner who for several years was associated with C. E. Mitchell in the mining promotion business. I was a witness in the case of United States against C. E.

Mitchell held in the above-entitled court at Spokane; I have read the affidavit of J. L. Dwyer filed in support of the above-named defendant's motion for a new trial.

In regard to the statement contained in paragraph one of said affidavit to the effect that I "framed up" his testimony that C. E. Mitchell had offered him Two Hundred ($200.00) Dollars and a ticket to Vancouver so as to be out of town at the time of the trial, I positively say that that portion of the affidavit is absolutely and unqualifiedly false. The information that C. E. Mitchell had made such an offer to the said Dwyer was communicated to me by said Dwyer voluntarily and without any inducements whatever.

In regard to the statement contained in paragraph second of said affidavit that I insisted that Dwyer swear that he brought Anaconda ore from his home and, at Mitchell's direction, sent it out through the mail labeled Montana Mammoth ore, I state positively that said statement contained in said affidavit is false and that the testimony concerning said matter given by said Dwyer at the trial was given of his own free will and accord.

In regard to the statement contained in paragraph three **[79]** of said affidavit relative to my insisting that he testify that he had seen me bring Black Cloud ore into Mitchell's office and send it out as Reliance ore, is false, and that he gave said testimony of his own free will and accord, and that the same was true.

That I never insisted upon said Dwyer making any

statement upon the witness-stand, and never threatened to expose him on a personal matter, or made any threat, or held out any inducement to him whatever with a view of influencing his testimony.

That I did not grab him by the arm and remind him of any such threat as he went down the stairs to the courtroom; that I did not have any conversation with him at all or see him as he was entering the courtroom.

That I did have a conversation with said Dwyer in the United States Marshal's office upon his return from Montana; that there was present, besides myself and Dwyer at said conversation, one Charles L. Sheely, a deputy United States marshal, and a portion of the time there was present S. H. Morse, a postoffice inspector; that during all of said conversation no threat whatever was made to Dwyer and no inducements offered him. The statement in the affidavit of said Dwyer that I was to take care of him after the trial and get him a good position as soon as it was over, is absolutely false; nor did I make any statement to him that he was going to be held without bonds, but on the contrary I was informed by him at the beginning of the conversation that his father was out getting bail for him and would be in in a short time; nor did Inspector Morse say to Dwyer, in my presence, that he had a serious charge against him, but that he, Dwyer, was not the man they were after, or that they "would let him go if he would say what Wagner said he knew," or any other statement of similar character.

In regard to the statement contained in said affidavit that during the trial, at the noon hour, Dwyer, W. L. Welch, John M. Scrafford, Alexander Herman and myself and wife would meet at my office and discuss our evidence and what to tell, I state that **[80]** several times during the trial myself and wife, Welch and Herman, both of whom had offices with me, met at my office, but that I do not believe that Dwyer was there on more than one occasion, and that at no time did we discuss our evidence, or direct each other what to say on the witness-stand.

That shortly before the 27th day of June, 1911, Dwyer told me, in conversation with him on the street, that Mitchell had offered him a "good thing" if he would make an affidavit repudiating the statements he had made upon the witness-stand and then leave the country. Since being informed of the affidavit made by said Dwyer, I have made diligent inquiry for him in and around Spokane, and I am informed and believe that he left Spokane at about the date of his making his affidavit.

VON K. WAGNER.

Subscribed and sworn to before me this 22d day of July, A. D. 1911.

[Notarial Seal] OSCAR CAIN,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Affidavit of Von K. Wagner. Filed July 24, 1911. W. H. Hare, Clerk. By F. C. Nash, Deputy. **[81]**

[Original Affidavit of Von K. Wagner.]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

United States of America,
Eastern District of Washington,
County of Spokane,—ss.

Von K. Wagner being first duly sworn, deposes and says:

I am the Von K. Wagner, who was a witness in the case of United States against C. E. Mitchell; that early in the month of June, 1911, I was informed by J. L. Dwyer, who was also a witness in said case, that C. E. Mitchell had procured, or was about to procure, an affidavit from W. L. Welch concerning certain matters in the C. E. Mitchell case. I immediately wrote to the said W. L. Welch, who was then in British Columbia, and shortly thereafter I received from him the hereto attached letter; said letter being mailed at San Francisco on July 3, 1911. I have been intimately associated with W. L. Welch for a number of years and I know his handwriting, and I know that the handwriting thereto attached is the handwriting of the said W. L. Welch.

VON K. WAGNER.

Subscribed and sworn to before me this 24th day of July, A. D. 1911.

OSCAR CAIN,

Notary Public in and for the State of Washington, Residing at Spokane, Washington. **[82]**

Exhibit "A."

[Letterhead of Brooklyn Hotel.]

San Francisco, Cal., July 2, 1911.

V. K. Wagner,

Spokane, Wash—

My Dear Von—

The case was dismissed in Victoria Thursday 6/29 and we left that afternoon, @ 5 P. M. for Seattle. Left Seattle Friday at 10 A. M. and arrived here today at 2 P. M. We don't know just what we will do here, may leave here Wednesday for Honolulu or wait for a steamer to Australia.

Am very thankful to you and Ellis and Campbell for what you did to help me.

If Mitchell says he has an affidavit from me he is a liar—I met this man Brown and he told me **[83]** Jack Dwyer had said that you, Scrafford and I had made up his testimony for him and scared him into saying what he did. I told him I knew nothing about it and was never present when Dwyer was talking to the inspectors. After some twenty minutes I saw that Brown was trying to pump me in Mitchell's interests and I shut up like a clam.

I am enclosing you an order on King and wish you would make him dig up my ring which he took from

me under threats. He certainly blackmailed me right. If you get the ring hold for me until further notice.

Hope things will pick up with you.

Your friend,

W. L. WELCH.

[Endorsed]: No. 871. In the District Court of the United States for the Eastern District of Washington. United States of America vs. C. E. Mitchell. Affidavit of Von K. Wagner and Exhibit. Filed July 24th, 1911. W. H. Hare, Clerk. By F. C. Nash, Deputy. **[83a]**

[Original Affidavit of Stephen H. Morse.]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

United States of America,
Eastern District of Washington,
County of Spokane,—ss.

Stephen H. Morse, being first duly sworn, on oath deposes and says:

I am a United States postoffice inspector, and was one of the inspectors who made the investigation which led up to the arrest and conviction of C. E.

Mitchell for fraudulent use of the mails:

That I know the signature of W. L. Welch, who was a witness on behalf of the Government in the above-entitled case; that exhibits 1, 2, 3, 4 and 5, attached hereto, were written and signed by the said W. L. Welch in my presence, and the signature appended is the signature of said W. L. Welch, who was a witness in said case. I have examined the affidavit of Wilbur L. Welch attached to the motion of C. E. Mitchell for a new trial in this case, and the signature appended to said affidavit is not the signature of W. L. Welch.

STEPHEN H. MORSE.

Subscribed and sworn to before me this 24th day of July, A. D. 1911.

[Seal] OSCAR CAIN,

Notary Public in and for the State of Washington, Residing at Spokane, Washington. **[84]**

Exhibit No. 1 [to Affidavit of S. H. Morse].

(1 page)

3/4/10

During November and December 1909 I sold 3000 Blue Bell Belcher the proceeds of which sales were turned over to C. E. Mitchell to be used in developing the property. These sales were made in Davenport Iowa and upon my return to Spokane I was told by C. E. Mitchell not to mention the matter to Geo. Foster the custodian of the property as he Mitchell had needed funds and had furnished the stock from

his personal holdings.

W. L. WELCH.

S. H. MORSE 3–4–'10
C. J. BACKUS 3/4/10 [85]

Exhibit No. 2 [to Affidavit of S. H. Morse].

(4 pages)

THE WELCH BROKERAGE CO., INC.
300–301–302 Columbia Bldg.
Day Phone Main 1786
Night Phone Main 6813

Codes:
Clough
Moreing & Neal
Western Union
3/4/10

Member of
Spokane
Stock Exchange Ltd.

W. L. Welch, age 39, Spokane Wash Stock & real estate broker.

In Sept 1907 I first started to handle stocks as a side line for C. E. Mitchell Co. continuing until Dec. 1908.

In June 1909 Mr. Mitchell & I organized the Welch Bro. Co. which was incorporated July 1–1909 and handled Mitchell stocks and others until latter part of Feb'y 1910 when I severed all connections with C. E. Mitchell and the Brokerage Co.

Have had no connection in any way with other than the following of C. E. M. promotions. Germ. Am. Montana Mammoth, East Snow storm, Blue Bell Belcher. Sold some Germ. Am. simply as a broker during the recent absorption of this Co. by the United Lead M. Co.

[Written on side of page:] O K W. L. W. [86]

Sold quite a lot of Montana Mammoth promotion stock and more recently have handled considerable as a broker. Sold quite a lot of E. Snow storm as a broker.

Sold a few thousand shares of Blue Bell Belcher last December.

Had nothing to do with any of the incorporations as an incorporator and have never been one of the trustees of any of them.

Was elected president of the E. S. S. in June 1909 (I think), but without my knowledge or consent. Sold the last of my E. S. S. holdings a week ago so am no longer an officer.

Am vice pres. of Montana Mammoth elected without being consulted and don't know just when it was but think it was January—1910.

As president of E. S. S. all I did was to sign

[Written on side of page:] O. K. W L W [87]

certificates as was directed by C. E. Mitchell. As Vice Pres of Montana Mammoth have done nothing.

Never attended any meetings of any of Mitchell's companies.

Knew nothing of any of the books or records kept by the different companies.

Never handled any money for any of the incorporations except as salesmen and after deducting my commission I turned net over to C. E. Mitchell or his bookkeeper P. G. Morgan. My commissions varied

from 30% to 50%—Don't remember how much of each I sold.

Never knew anything about the financial condition of the C. E. M. companies and had no access to the books.

[Written on side of page:] O K W L W [88]

I visited Kennedy Creek, Montana Mammoth, Eagle, and East Snowstorm. I am not competent to judge of the value of a mining property and based my opinion on what I was told by Aughey, Scrafford, McCullough and Mitchell.

I will have to admit I was simply a dummy as pres. of E. S. S.

I was perfectly satisfied with the management of the companies by C. E. M. but am of the opinion I was credulous.

W. L. WELCH.

S. H. MORSE
C. J. BACKUS 3/4/10 [89]

Exhibit No. 3 [to Affidavit of S. H. Morse].

(1 page)

3/4/10

I knew a "unit syndicate" was being formed by C. E. Mitchell @ $5.00 per unit to purchase E. S. S. on the open market but to the best of my knowledge and belief none was ever purchased in the open market or any where else by me or the W. B. Co. for the unit %.

~~WB~~ W. L. WELCH.

S. H. MORSE
C. J. BACKUS 3/4/10 [90]

Exhibit No. 4 [to Affidavit of S. H. Morse].

(1 page)

On Mch 8– 1910 in his office in Exchange Bldg R. H. Dunn stated to me that "we have fixed the minutes of the E. S. S." so as to properly account for $3000.00 of the E. S. S. shortage.

W. L. WELCH. [91]

Exhibit No. 5 [to Affidavit of S. H. Morse].

(2 pages)

Spokane, Wash.
April 7–1910.

I wish to state that my affidavit of April 5–1909 regarding a conversation with one John Fullinwider P. O. Insp. at Moscow Idaho about Nov. 17-1908 at and written
Hotel Moscow was made ∧ by C. E. Mitchell and signed by me at his request.

The conversation occurred at said time and place in a spirit of friendly advice to me as I was trying to get up a subscription list for the sale of a block of C. D. A. Eagle stock which was one of the properties promoted by C. E. Mitchell and at that time was and since then has been idle.

My relations with Mr. Fullinwider have been amicable except as Mr. Mitchell tried to prejudice me against him. I have never been able to discover where Mr. Fullinwider showed any animosity or prejudice against anyone in the C. E. Mitchell investigation, and had I heeded his advice at that time

[Written on side of page:] O K W. L. W.

I [92] would have saved myself endless trouble and loss of friends by my connection with said C. E. Mitchell. The conditions as inferred at that time by Mr. Fullinwider have since been proven to me to be correct and even much worse.

Referring to the conversation with Mr. Perry editor of the Spokane Press I wish to say I was sent by Mitchell to Perry to remonstrate with him against the appearance of the article in question and Perry stated that an investigation was on but he did not state that he had received his information from any particular person, and furthermore that as it was generally known about town that the investigation was on he considered it a proper news item. (This statement consists of two pages and is made voluntarily by me.)

W. L. WELCH. [93]

[Endorsed]: No. 871. In the District Court of the United States for the Eastern District of Washington. United States of America, vs. C. E. Mitchell. Affidavit of S. H. Morse, and Exhibits. Filed July 24th, 1911, W. H. Hare, Clerk. By F. C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of Thomas E. Hines].

State of Washington,
County of Spokane,—ss.

Thomas E. Hines, being first duly sworn on his oath deposes and says: That he is the head clerk at the Coeur d'Alene Hotel and was such head clerk during the entire month of June, 1911; that said hotel is in the City of Spokane, State of Washington, at the corner of Front Avenue and Howard Street; that on or about the twenty-seventh day of June, 1911, at about the hour of one o'clock A. M. two young men entered the hotel and asked the night clerk, Jerome Nash, to call John C. Callahan. notary public, to take the oath of one of them to a paper which he held in his hand. After some delay and objections on the part of Clerk Nash, the latter called John C. Callahan on the telephone, said Callahan having retired for the night; that thereupon affiant went with the two young men to the room of said John C. Callahan and that the smaller of the two young men then signed and swore to a certain

paper which comprised several sheets written with a pen; that affiant has since understood that the young man who signed the affidavit was John L. Dwyer; that said Dwyer was in a normal mental state and showed no signs of the influence of liquor or drugs.

THOS. E. HINES.

Subscribed and sworn to before me this 31st day of July, 1911.

[Notarial Seal] JNO. C. CALLAHAN,
Notary Public in and for the State of Washington, Residing in Spokane. [94]

[Endorsements]: Receipt of copy hereof and service thereof admitted this 3d day of August, 1911.

OSCAR CAIN,
U. S. District Attorney.

Affidavit. Filed in the U. S. District Court, Eastern District of Washington. August 3, 1911. W. H. Hare, Clerk. By S. M. Russell, Deputy. [95]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. E. MITCHELL,
Defendant.

Affidavit [of Jerome B. Nash].

State of Washington,
County of Spokane,—ss.

Jerome B. Nash, being first duly sworn, on his oath deposes and says: That he is seventeen (17) years of age, has always been a resident of Spokane, Washington, is employed as night clerk at the Coeur d'Alene Hotel in Spokane, and was so employed during the entire month of June, 1911.

That affiant is well acquainted with John L. Dwyer, being the same John L. Dwyer who testified as a witness for the Government in the above-entitled case, affiant having been a schoolmate of said John L. Dwyer at Gonzaga College, in Spokane.

That one night during the latter part of June, 1911, affiant was on duty at said hotel as night clerk when said John L. Dwyer entered the hotel accompanied by Billy Mitchell, who is also known to this affiant; that Dwyer asked to see John C. Callahan, who resides at said hotel and is a notary public; that affiant informed said Dwyer that the said Callahan had retired for the night and that it was against the rules to disturb him at that late hour, it being then after one o'clock A. M.; that said Dwyer insisted that he must see the said notary and said to affiant that he had a document which must be sworn to at once as he had to leave town on an early train that morning; that said Dwyer urged affiant so hard that affiant consented to call said Callahan on the house telephone and did so call him;

That said Dwyer and said Mitchell then went up in the elevator and presently came down and went out of the hotel; [96]

That said Dwyer was not under the influence of liquor or drugs and was in a normal mental state; being able to express himself clearly and vigorously.

JEROME B. NASH.

Subscribed and sworn to before me this 27th day of July, 1911.

[Notarial Seal] J. OAKLAND,
Notary Public in and for the State of Washington, Residing in Spokane.

[Endorsements]: Receipt of copy hereof and service thereof admitted this 3d day of August, 1911.

OSCAR CAIN,
U. S. District Attorney.

Affidavit. Filed in the U. S. District Court, Eastern District of Washington, August 3, 1911. W. H. Hare, Clerk. By S. M. Russell, Deputy. [97]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of John C. Callahan].

State of Washington,
County of Spokane,—ss.

John C. Callahan, being first duly sworn, on oath deposes and says: That he is a resident of the City of Spokane, County of Spokane, State of Washington, where he has resided for about three years; that he is a notary public in and for the State of Washington, commission expiring June 15th, 1914. That on or about the twenty-seventh day of June, 1911, at about the hour of one A. M. two young men came to his room in the Coeur d'Alene Hotel, in company with Thomas E. Hines, the head clerk of said hotel. That one of the said two young men handed affiant a paper, stating that he wished to sign the same and have it acknowledged; that thereupon said party signed the said paper, and affiant took his acknowledgment thereof. That said person signed said paper in the name of "J. L. Dwyer," and acknowledged that such was his name; that said Dwyer was in a normal mental state at said time, and showed no signs of the influence of liquor or drugs.

JNO. C. CALLAHAN.

Subscribed and sworn to before me this 3d day of August, 1911.

[Notarial Seal] W. L. JACKSON,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Receipt of Copy Hereof and Service Thereof Admitted this 3d day of August, 1911.

OSCAR CAIN,
U. S. District Attorney.

Affidavit. Filed in the U. S. District Court, Eastern District of Washington, August 3, 1911. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[98]**

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of Willard E. Mitchell].

State of Idaho,
County of Shoshone,—ss.

Willard E. Mitchell, being first duly sworn, on his oath deposes and says: That he is twenty-two (22) years of age and is the son of C. E. Mitchell, defendant in the above case; and that he is well acquainted with John L. Dwyer, being the same John L. Dwyer who testified in behalf of the Government in the trial of said case in the court aforesaid in May, 1911; that affiant has been intimately associated with said Dwyer, on account of affiant having been employed in the office of the C. E. Mitchell Company

at the same time that said Dwyer was employed there and that the relations existing between affiant and said Dwyer have always been close and friendly.

That on Monday, June 26th, 1911, affiant met said Dwyer near the corner of Wall Street and Riverside Avenue, in the City of Spokane, Washington, at 11 o'clock A. M.; that this was the first time affiant had seen said Dwyer since the trial of defendant Mitchell in the case aforesaid; that affiant said to Dwyer: "Hello, Jack!" and passed on, when Dwyer hailed affiant and said: "I didn't think you would ever speak to me again, Billy," to which affiant replied, "I have always believed, Jack, that you would tell the truth about this thing sometime"; to which said Dwyer replied: "Now just let me do some talking, Billy; let's take a walk and I'll tell you all I know."

That affiant and said Dwyer then walked up Wall Street to Fourth Avenue and sat for a long time on the steps of Hawthorne **[99]** School, and that during said time, said Dwyer talked steadily and without any questioning of importance and told affiant with greatest detail a circumstantial story detailing many conferences with Postoffice Inspectors Morse, Fullinwider, Watson and others, and relating frankly and freely a statement of the efforts of Von K. Wagner to induce said Dwyer to give false testimony in said case against C. E. Mitchell; that affiant offered no suggestion or inducement whatever to secure the statement from said Dwyer; that said Dwyer was in full possession of his normal

faculties and was not under the influence of liquor or of any drug, as far as affiant could judge from his conversation and general appearance and that said Dwyer showed every indication of relief of mind in telling his story, saying: "I'm glad I found you this morning, Billy; there isn't anyone else I would tell this story to, for I know I can trust you."

That after said Dwyer had completed his statement to affiant, affiant said to said Dwyer: "You ought to make an affidavit about all this now and help my old man to get a new trial"; that said Dwyer agreed to make an affidavit and affiant then suggested that he and Dwyer go at once to an attorney's office to prepare same, but Dwyer declined to go to an attorney, saying: "I will write it out myself and then I will swear to it."

That affiant met said Dwyer again the following morning, to wit: June 27th, 1911, by appointment down town, and that affiant and Dwyer took a Maxwell Avenue car and went to the end of the line in the northwestern part of the City of Spokane, going there at Dwyer's request so as to be beyond sight or hearing of any person; that Dwyer then took from his pocket and handed to affiant a statement written on ordinary note size tablet paper in pencil, setting forth in substance the same matters which have since been put into said Dwyer's affidavit; namely Exhibit "D" attached to the motion for a new trial in said case; that said Dwyer expressed his dissatisfaction with said statement and said it was not complete enough to suit him; Dwyer then said

he would return to **[100]** the city and would rewrite the statement with a pen and would have it ready that evening.

That affiant met said Dwyer that evening, to wit: the evening of Tuesday, June 27th, 1911, at about 9:30 o'clock and after walking about the streets for a few minutes, affiant and said Dwyer went to a lodging-house in Sprague Avenue and engaged a room; that said Dwyer sat down at a table and affiant sat opposite him and that said Dwyer then proceeded to write on a large sized tablet of plain writing paper with a fountain pen furnished by affiant, that certain statement which said Dwyer later swore to and which is now Exhibit "D," attached to the motion for a new trial of the defendant Mitchell in the case aforesaid; that said statement was written by said Dwyer of his own free will and volition, and without suggestion, threat or pressure or any undue influence from affiant; that said statement was written with great care by said Dwyer who spent much time in considering each paragraph before and after he wrote same, frequently destroying sheets and rewriting them, so that it was after midnight when the paper was finished.

That after finishing the writing aforesaid, affiant and said Dwyer went to the Coeur d'Alene Hotel, seeking a notary public to take the oath of said Dwyer; that upon reaching the hotel aforesaid the said Dwyer went to the clerk, Jerome Nash, who was a former schoolmate of said Dwyer, and Dwyer asked Nash where the notary public, Callahan, was;

that the clerk Nash replied that the notary had gone to bed; that Dwyer asked that Callahan be called but Nash refused saying it was against the rules of the house, but Dwyer insisted most vigorously and said the paper had to be signed at once and finally persuaded the clerk, Nash, to call the notary, Callahan, on the house telephone; whereupon Dwyer and affiant went up in the elevator to the room of said notary, Callahan, who got out of bed and took the written statement from said Dwyer's hands and swore said Dwyer to same; that affiant and Dwyer then left the notary's room and returned in the elevator to the ground floor **[101]** of the hotel and thence to the street; that after reaching the street, said Dwyer handed said sworn statement to affiant.

That on June 29, 1911, affiant left Spokane and has been absent from said city ever since and that affiant has not seen nor heard from said Dwyer since the date aforesaid.

WILLARD E. MITCHELL.

Subscribed and sworn to before me this 26th day of July, 1911.

[Notarial Seal] J. H. WIXOM,
Notary Public in and for the State of Idaho, Residing at Mullan; my commission expires July 6, 1913.

[Endorsements]: Receipt of Copy Hereof and Service Thereof Admitted this 3d day of August, 1911.

OSCAR CAIN,
U. S. District Attorney.

Affidavit. Filed in the U. S. District Court, Eastern District of Washington. August 3, 1911. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[102]**

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. E. MITCHELL,
Defendant.

Affidavit [of C. E. Mitchell].

State of Washington,
County of Spokane,—ss.

C. E. Mitchell, being first duly sworn on his oath deposes and says: That he is the defendant in the aforesaid cause, that he has been a resident of Spokane, Washington for over fourteen (14) years and that he knows Wilbur L. Welch, who is the same Wilbur L. Welch of W. L. Welch who testified as a witness for the Government in the above-entitled case; that affiant has become familiar with the handwriting of said Wilbur L. Welch through about four years of business deals and correspondence.

That he has carefully examined the signatures as well as the body of the writings in the documents attached hereto, which documents are marked Exhibits "A," "B," "C," "D." That he has compared said Exhibits "A," "B," "C," and "D" with Exhibit "A," attached to the affidavit of Von K. Wag-

ner on file herein and to Exhibits 1, 2, 3, 4 and 5, attached to the affidavit of Stephen H. Morse, on file herein, and to Exhibit "E" attached to motion of defendant for new trial, a copy of which Exhibit "E" is hereto attached, and marked Exhibit "E," and that he is convinced from such examination that the writings thereon are all made by one and the same person, to-wit, by Wilbur L. Welch, and that the signatures are all the signatures of said Wilbur L. Welch, and affiant is convinced that said Wilbur L. Welch in signing the affidavit referred to herein and marked Exhibit "E" did wilfully undertake to so disguise and change his said writing and signature as to make it appear that it might be a forgery, but affiant finds upon comparison [103] of said signatures with other writings of said Wilbur L. Welch, many characteristic forms and curves as well as letters and combinations of letters sufficient to warrant the affiant's positive assurance that the said signatures are the signatures of said Wilbur L. Welch.

C. E. MITCHELL.

Subscribed and sworn to before me this 2d day of August, 1911.

[Notarial Seal] NEIL C. BARDSLEY,
Notary Public in and for the State of Washington,
Residing in Spokane.

[Endorsements]: Receipt of Copy Hereof and Service Thereof Admitted this 3d Day of August, 1911.

OSCAR CAIN,
U. S. District Attorney.

Affidavit. Filed in the U. S. District Court, Eastern District of Washington, August 3, 1911. W. H. Hare, Clerk. By S. M. Russell, Deputy. [104]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Affidavit [of George Foster].

State of Washington,
County of Spokane,—ss.

George Foster, being first duly sworn, on his oath deposes and says: That he is a resident of the State of Washington for over twenty (20) years and that he known Wilbur L. Welch, who is the same W. L. or Wilbur L. Welch who appeared as a witness for the Government in the above-entitled case; that affiant is familiar with the handwriting of the said Wilbur L. Welch through about four years of more or less intimate office association, deals and correspondence.

That he has carefully examined the signatures as well as the body of the writing in the documents attached hereto, which documents are marked Exhibits "A," "B," "C," "D." That he has compared said Exhibits "A," "B," "C" and "D" with Exhibit "A," attached to the affidavit of Von K. Wag-

ner on file herein and with Exhibits 1, 2, 3, 4 and 5 attached to the affidavit of Stephen H. Morse, on file herein, and to Exhibit "E" attached to motion of defendant for a new trial, copy of which Exhibit "E" is hereto attached, marked Exhibit "E," and that he is convinced from such examination that the writings thereon were all made by one and the same person, and are the signatures of said Wilbur L. Welch, and affiant believes that said Wilbur L. Welch in signing the affidavit referred to herein and marked Exhibit "E" did wilfully undertake to so disguise and change his writing of his signature so as to make it appear that it might be a forgery, affiant finds upon careful comparison of said signatures with other writings of said Wilbur L. Welch many characteristics, [105] the spread of his ink and curves as well as combination of letters sufficient to warrant affiant's positive assurance that the said signatures are the signatures of said Wilbur L. Welch.

GEORGE FOSTER.

Subscribed and sworn to before me this 2d day of August, 1911.

[Notarial Seal] NEIL C. BARDSLEY,
Notary Public in and for the State of Washington,
Residing in Spokane.

[Endorsements]: Receipt of Copy Hereof and Service Thereof Admitted this 3d day of August, 1911.

OSCAR CAIN,
U. S. District Attorney.

Affidavit. Filed in the U. S. District Court, Eastern District of Washington, August 3, 1911. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[106]**

[Original Affidavit of E. F. Timberman.]

In the District Court of the United States of America, Eastern District of Washington, Eastern Division.

No. 871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

State of Washington,
County of Spokane,—ss.

E. F. Timberman, being first duly sworn, on his oath deposes and says: That he is a resident of the City of Spokane, County of Spokane, State of Washington, where he has resided for more than eleven years last past; that he has had fifteen years experience in the teaching and study of penmanship, and that during such time he has made a special study of signatures, handwritings and the detection of forgery, and has been called as an expert in many courts to testify as to the genuineness of signatures and handwritings.

That he has carefully examined, not only the signatures attached to the docu*emtn*s attached hereto, but also the body of said documents, marked Exhibit "A," "B," "C" and "D"; that he has com-

pared said Exhibits "A," "B," "C," and "D" with Exhibit "A" attached to the affidavit of Von K. Wagner on file herein and with Exhibits 1, 2, 3, 4, and 5 attached to the affidavit of Stephen H. Morse, on file herein, and to Exhibit "E" attached to *defendant* amended motion and petition for a new trial, an exact copy of which Exhibit "E" is hereto attached, and marked Exhibit "E," and that from such examination he is convinced that the writings thereon are all made by the one and the same person; that the signatures are the signatures of the one and the same [107] person, and that he is convinced from such examination that said person in making the affidavit attached to defendant's amended motion and petition for a new trial, referred to therein and herein, and marked therein and herein Exhibit "E," did attempt wilfully to so disguise his said writing and signature that it might appear to be a forgery; that affiant after careful examination of such signatures and handwritings finds therein so many distinguishing characteristics, forms and curves, as well as letters and combinations of letters, that he therefore states that in his opinion the signatures and writings are made by the one and the same person.

E. F. TIMBERMAN.

Subscribed and sworn to before me this 3rd day of August, 1911.

[Seal] G. G. RIPLEY,

Notary Public in and for the State of Washington, Residing at Spokane. [108]

[Original Affidavit of W. E. Allen.]

In the District Court of the United States of America, Eastern District of Washington, Eastern Division.

No. 871.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. E. MITCHELL,
Defendant.

State of Washington,
County of Spokane,—ss.

W. E. Allen, being first duly sworn on oath deposes and says: That he is a resident of the City of Spokane, Spokane County, State of Washington, where he has resided for about four (4) years last past; That he is the proprietor of Allen's Business College in said city; that he has had twenty-three (23) years experience in teaching penmanship and the study thereof, and that during such time he has made a special study of detection of forgery and has been called as an expert in many courts to testify to the genuineness of signatures and handwriting.

That he has carefully examined not only the signatures attached to the documents attached hereto, but also the body of the writing which documents are marked Exhibits "A," "B," "C," and "D," that he has compared said Exhibits "A," "B," "C" and "D" with Exhibit "A" attached to the affidavit of Von K. Wagner on file herein, and to "Exhibits 1,

2, 3, 4 and 5" attached to the affidavit of Stephen H. Morse, on file herein, and to Exhibit "E" attached to motion of defendant for a new trial, a copy of which Exhibit "E" is hereto attached, and marked Exhibit "E" and that from such examination he is convinced that the writings thereon are all made by the one and the same person; that the signatures are the signatures of the one and the same person **[109]** and that he is convinced that said person in making the affidavit attached to defendant's motion for new trial, referred to therein and marked Exhibit "E" did attempt to so disguise his said writing and signature that it might appear to be a forgery; that affiant after careful examination of such signatures and handwritings finds therein so many similar and distinguishing characteristic forms and curves as well as letters and combination of letters that he therefore states that *it his* opinion the signatures and writings are made by the same person.

W. E. ALLEN.

Subscribed and sworn to before me this 2d day of August, 1911.

[Seal] NEIL C. BARDSLEY,
Notary Public in and for the State of Washington,
Residing at Spokane. **[110]**

Exhibit "A" [to Affidavit of W. E. Allen].

[Letterhead of Hotel Kimball.]

Davenport, Iowa, 11/29/09.

My Dear Mitch,

I became throughly tired of Pugh's dilatory methods and shook the mud off my shoes, left D. M.

today noon and arrived here this evening.

Your telegram beat me here and I wired you as follows:—"Yarn rejects Kennedy my address Kimball Hotel Davenport phone Anna." Yarn wants it all so I knew he would not consider K. Crk. He wants the whole thing for himself.

I am going to advertise here for a few days and see if there is not [111] something doing. Pugh is discredited quite a bit in D. M. and I am sure I got off wrong there.

I will work hard on E. S. S. G. A., and BBB here and get something started or "bust" the harness.

Think I will be in Chgo by the end of the week unless I get to going so good here I can't leave it.

I traded today to Dr. W. N. McKay 216 Flynn Bldg D. M. Cert B 562 1000 E. S. S. for a handsome piece of free gold ore. Think I can get around $25.00 for it. [112] He is a good fellow for us to tie to.

Am glad to learn that the inspectors are sleeping sweetly.

Your friend
W. L. WELCH. [113]

Exhibit "B" [to Affidavit of W. E. Allen].

[Letterhead of Billings Brewing Company.]

Billings, Mont., 11/5 1909.

C. E. Mitchell,
Spokane Wn.

My Dear Friend:

This stationery does not signify anything, I just stopped off at Billings while the train waited and begged it as there was none aboard.

You are to write to Mr. Monahan on your own stationery about E. S. S. and his line up is as follows.—A Mr. Wall who is a friend of the Greenoughs will buy E. S. S. if he likes it and can come to terms with you.

In the meantime Wall & Monahan will quietly clean the market and if they wish will publish an interview with Greenoughs about the lease or bonding of the property and send the stock skyward. **[114]** Monahan treated me royally and will give us all of his business. Any orders from him to buy or sell at market are to be executed and regular commissions only be charged. The Butte camp is a wonderful one, he drove me all through it, and I am only sorry that we did not make a trip to Butte long ago. I believe it is an ideal place to pull off stunts and Monahan is certainly "the candy Kid"

Truth is certainly "at the helm" on this trip and I believe great things are going to come from it.

Yours very truly

W. L. WELCH [115]

Exhibit "C" [to Affidavit of W. E. Allen].

[Letterhead of Hotel Monroe.]

Grinnell, Iowa, 11/19/1909.

My Dear "Mitch"

Have been down here three days trying to scare up business but not much doing so back to D. M. tomorrow for me.

I sold #181 for 200 shares BBB @ 2½ ¢ to E. B. Brande Grinnell Iowa and enclose check for $5.00

to cover. Don't write to him about it and I will tell you all when I see you again.

Yours truly

W. L. WELCH.

P. S. Will write fully tomorrow [116]

Exhibit "D" [to Affidavit of W. E. Allen].

[Letterhead of Idaho Land and Investment Company.]

Des Moines, Iowa, Nov. 22–1909.

My Dear "Mitch"

I have read your favors of 17th & 18th and regret that error is still screaming but believe that its finish is right at hand for "Soul has infinite resources with which to bless mankind" and "No weapon turned against thee shall prosper"

Am very glad some big deals look uncouraging to you—I believe I will be able to send you some funds quickly now as Pugh has at last got down to work.

Wish you would look in my stock book and get the number of 5000 Cert Hypo bought from Le Marinel. That is the one we turned over to Torrence and we must send $25.00 over to Wallace by Dec 1st [117] I may get this money so late I will have to wire it so I am telling you all this beforehand.

Oh yes about Levy at Omaha. He is an old pal of mine. In 1898 I had him for an office boy with Armour & Co. So Omaha and took an interest in him, treated him kindly while others teased him % of being a Jew. He always said he would go in business with me when he grew older. He has been trying to locate me for several years and now he has found me he swears he will sell out and put all of

his capital $10,000 in with me. Listens good don't it? Exit "Mitch."

A big snowstorm on here today [118] perhaps there will be sleighing but what's the use when one has no "baby" to take.

I could get real lonesome if I would permit it but I am "boss" here so nothing doing May go to my aunts for "Turkey" dinner thursday its just 78 miles away and .2¢ fare all over Iowa.

Keep looking to the hills from whence cometh our help.

Your pal
W. L. WELCH. [119]

[Original Affidavit of J. R. Brown—Attached to Affidavit of W. E. Allen.]

In the District Court of the United States of America, Eastern District of Washington, Eastern Division.

No. 871.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. E. MITCHELL,
Defendant.

State of Washington,
County of Spokane,—ss.

J. R. Brown, being first duly sworn, on oath deposes and says: That he is a resident of the City of Spokane, Spokane County, State of Washington; where he has resided for nearly twelve years; that for about four years last past he has been personally acquainted with Wilbur L. Welch, being the same

Wilbur L. Welch who testified in said City of Spokane for the Government in the above-entitled action; that on the 12th day of June, 1911, affiant was in the City of Vancouver, Province of British Columbia, Dominion of Canada, where hes had several conversations with the said Wilbur L. Welch; that on said day said Welch in his presence and before W. L. Brougham a notary public, in and for the Dominion of Canada, in the Province of British Columbia, signed the affidavit hereto attached; that at said time he also signed an exact copy of said affidavit, which copy affiant is advised, and believes, has been filed with the Clerk of this Court as a part of the records and files in the above-entitled cause.

[Seal] J. R. BROWN.

Subscribed and sworn to before me this 31st day of July, 1911.

[Seal] NEIL C. BARDSLEY,

Notary Public in and for the State of Washington, Residing at Spokane. [120]

Exhibit "E" [Original Affidavit of Wilbur L. Welch] to Affidavit of W. E. Allen.

Dominion of Canada

Province of British Columbia,—ss.

AFFIDAVIT.

WILBUR L. WELCH, being first duly sworn, on his Oath deposes and says:

THAT for many years last past he has been, and now is, acquainted with C. E. Mitchell, being the same C. E. Mitchell who was convicted in the City of Spokane, State of Washington, United States of

America, for using the Mails of the United States with intent to defraud; That affiant is the same Wilbur L. Welch who testified as one of the witnesses on behalf of the Government in said trial.

Affiant further says, that for several years he was associated with said Mitchell in his office in the City of Spokane and was familiar with several attacks made upon said C. E. Mitchell through Inspectors Fullinwider and Morse of the Post Service and that he made two Affidavits on behalf of said Mitchell in the hearings had at Washington D. C.

THAT in 1910 by reason of his having had a disagreement with said Mitchell he left the employ of said Mitchell and for all time since said time has remained out of the employ of the said Mitchell.

THAT this Affiant is well acquainted with Von K. Wagner one of the witnesses for the Government in the above mentioned case, also J. M. Scrafford, and John Dwyer also witnesses for the Government; that from 1910 up till the trial of said case he was in close communication with the above mentioned Wagner and somewhat with the said Dwyer, and familiar with some of the plans and steps taken by them to secure a conviction of the said C. E. Mitchell; that the said Von K. Wagner stated in the presence of this Affiant "That if Mitchell had let him (Wagner) **[121]** alone, he would have let Mitchell alone, but since Mitchell did not leave him (Wagner) alone, he (Wagner) was going to show Mitchell that he (Wagner) was a good fighter, and he (Wagner) was going after Mitchell"; that in pursuance of this threat the said Von K. Wagner held

many private audiences and consultations with the said John Dwyer in the backroom of 503 Kuhn Building in the city of Spokane, these audiences relating to the evidence to be given in the above mentioned case, and that the said Wagner instructed this Affiant "not to speak to Dwyer at all about this case even if he (affiant) met him (Dwyer) on the street" saying "I will handle Dwyer."

THAT the said Wagner was continually thinking up schemes with which to aid the prosecution in the conviction of Mitchell.

THAT Inspector Morse told this affiant that he had witnesses Perry Morgan and R. H. Dunn, who testified in the above mentioned case, "where they had to be good" Dunn because he was a partner of Mitchell' and Morgan because he had signed a false Affidavit.

WILBUR L. WELCH.

Subscribed and sworn to before me this 12th day of June, 1911.

W. F. BROUGHAM,

Notary Public in and for the Dominion of Canada, in the Province of British Columbia, residing at Vancouver. My Commission ~~expires~~ is for life.

Dominion of Canada,
Province of British Columbia,—ss:

Wilbur L. Welch, being first duly sworn on Oath deposes and says: That he is the same Wilbur L. Welch, as named in, and who made and executed the above and foregoing Affidavit; that he made and executed

the same of his free and voluntary act and will, and acting under no duress of any kind; that he has read the same, knows the contents thereof, and believes the same to be true.

WILBUR L. WELCH,

Subscribed and sworn to before me this 12th day of June, 1911.

[Seal] W. F. BROUGHAM. [122]

Receipt of a copy hereof services thereof admitted this 3d day of August, 1911.

OSCAR CAIN,
U. S. Dist. Atty.

[Endorsed]: District Court of U. S. Eastern Dist. of Washington, Eastern Division. #871. United States of America, Plff. vs. C. E. Mitchell, Deft. Affidavit. Filed in the U. S. District Court, Eastern Dist. of Washington, Aug. 3, 1911. W. H. Hare, Clerk. By S. M. Russell, Deputy. J. T. Mulligan, F. D. Adams Attys. for Deft. 501–4 Payton Blk., Spokane.

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. E. MITCHELL,
Defendant.

Petition for Writ of Error.

Comes now the above-named defendant, C. E. Mitchell, your petitioner, and deeming himself aggrieved by the orders, rulings, judgment and sentence of said Court with reference hereto and in the trial of this

cause in overruling the demurrer of the defendant to the indictment herein; in denying the defendant's motion for a bill of particulars; in denying defendant's motion for an instructed verdict; in the admission of certain evidence offered by the plaintiff, which said evidence is the same referred to in the assignment of errors filed herewith; in the giving of its instructions to the jury, being the same instructions referred to in the assignment of errors herewith filed; and further deeming himself aggrieved by reason of the refusal of the said court and Judge to grant the defendant a new trial on account of said errors of law so occurring in the proceedings, rulings, orders and trial herein, and by that order denying defendant's motion for a new trial filed herein on the —— day of May, 1911, and defendant's petition and amended motion for a new trial, made and filed herein on the 15th day of July, 1911; and further deeming himself aggrieved by the refusal of said court and Judge to grant the defendant's motion in arrest of judgment; and further deeming himself aggrieved by the verdict of the jury herein,

Your petitioner hereby appeals from said orders, rulings, judgment and sentence to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herewith.

And your petitioner, defendant herein, deeming himself [123] aggrieved, and complaining that in the record and proceedings upon said trial, as well as in the rulings, orders, judgment and sentence as aforesaid, manifest error hath happened to the great

damage of said defendant, your petitioner herein, he does respectfully pray that on account thereof his appeal be allowed, and that a writ of error issue to correct the said errors complained of, and to reverse and annul the said orders, rulings, judgment and sentence against this defendant.

Your petitioner respectfully shows that he has this day filed herewith his assignment of errors committed by the court in said cause, and intended to be urged by your petitioner as plaintiff in error in the prosecution of this suit upon its appeal.

Dated this 24th day of July, 1911.

JOHN T. MULLIGAN,
FRANCIS D. ADAMS,
JOHN C. KLEBER,
ALEX WINSTON,
Attorneys for Defendant.

[Endorsements]: Service of a copy of within Petition for Writ of Error admitted this 24th day of July, 1911.

OSCAR CAIN,
U. S. District Attorney.

Petition for Writ of Error. Filed in the U. S. District Court, Eastern District of Washington, July 24, 1911. W. H. Hare, Clerk. [124]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Order Allowing Writ of Error.

Comes now C. E. Mitchell, defendant above named, on this 24th day of July, 1911, and files and presents to this Court his petition, praying for an allowance of a writ of error intended to be urged by him; and further praying that a duly authenicated transcript of the records, proceedings and exhibits upon *the* which the judgment herein was rendered, may be sent to the Circuit Court of Appeals for the Ninth Circuit, held at San Francisco, San Francisco County, State of California; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this Court desiring to give petitioner an opportunity to test in the said Circuit Court of Appeals the questions therein presented,

IT IS ORDERED by this Court that a writ of error be allowed as prayed, provided, however, that said C. E. Mitchell, defendant, give bond according to law in the sum of Five Thousand ($5000.00) Dollars, which said bond shall operate as a supersedeas bond.

In Testimony Whereof, witness my hand this 24th day of July, 1911.

FRANK H. RUDKIN,
Judge of District Court in said District.

[Endorsements]: Service of copy of within order admitted this 24th day of July, 1911.

OSCAR CAIN,
U. S. District Attorney.

Order Allowing Writ of Error. Filed in the U. S. District Court. Eastern District of Washington. July 24, 1911. W. H. Hare, Clerk. [125]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. E. MITCHELL,
Defendant.

Bond [on Writ of Error].

KNOW ALL MEN BY THESE PRESENTS, That we, C. E. Mitchell as principal, and George Foster and R. J. Pierce as sureties, of the City and County of Spokane, State of Washington, are held and firmly bound unto the United States of America in the sum of Five Thousand ($5000.00) Dollars, lawful money of the United States of America, to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators,

firmly by these presents.

Sealed with our seals and dated this 24th day of July, 1911.

WHEREAS, the above-named C. E. Mitchell has prosecuted a writ of error to the Circuit Court of Appeals for the Ninth Judicial Circuit to reverse the judgment and grant him a new trial in the above-entitled action by the District Court of the United States, in and for the Eastern District of Washington, Eastern Division.

NOW, THEREFORE, the condition of this obligation is such that if the above-named C. E. Mitchell shall prosecute his said writ of error to effect, and surrender his body unto the said Court if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

C. E. MITCHELL, [Seal]
Principal.
GEORGE FOSTER, [Seal]
R. J. PIERCE, [Seal]
Sureties. [126]

State of Washington,
County of Spokane,—ss.

On this 24th day of July, 1911, before me came personally C. E. Mitchell, George Foster and R. J. Pierce, who are respectively to me known to be the persons described in and who executed the foregoing instrument of writing as parties thereto, and respectively acknowledged, each for himself, and not for one another, that they executed the same as their free act and deed and for the uses and purposes therein set forth.

And the said George Foster and R. J. Pierce, being respectively by me sworn, says, each for himself, and not for one another, that he is a resident of said County of Spokane, and that he is worth the sum of Five Thousand ($5000.00) Dollars, over and above his just debts and legal liabilities and property exempt from execution.

GEORGE FOSTER.
R. J. PIERCE.

Subscribed and sworn to before me this 24th day of July, 1911. Approved July 24, 1911.

W. H. HARE,
Clerk of said Court.

[Endorsements]: Service of copy of within Bond admitted, and same is satisfactory both as to sureties and form. July 24, 1911.

OSCAR CAIN,
U. S. District Attorney.

Bond on Appeal. Filed in the U. S. District Court, Eastern District of Washington, July 24, 1911. W. H. Hare, Clerk. [127]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. E. MITCHELL,

Defendant.

Assignment of Errors.

Comes now the defendant, C. E. Mitchell, and, in connection with his writ of error and appeal herein, makes the following assignment of errors, which he avers occurred upon the trial and in this cause:

I.

The Court erred in overruling the demurrer of the defendant to the indictment herein, for the reason that said indictment failed to set forth facts sufficient to constitute a crime under section 5480 of the Revised Statutes of the United States of America, as amended by the Act of March 2d, 1899, (25 Stat. P. 873) in this, to wit:

(a) The indictment does not charge that a scheme or artifice to defraud was devised by the defendant within three years next prior to the return or filing of the indictment;

(b) The indictment does not charge that the offense was committed within three years next prior to the return or filing of the indictment;

(c) The indictment does not charge the entering into a scheme or artifice to defraud by the C. E. Mitchell Company prior to the commencement of the use of the mails;

(d) The indictment does not set out clearly or distinctly what the scheme or artifice was wherein the fraud consisted;

(e) The indictment does not charge that any person was defrauded or that any person had been deprived of money or property by the alleged misrep-

resentations as set forth in the indictment;

(f) The indictment does not charge that the defendant profited in [128] any manner in any of the transactions as set forth in the indictment;

(g) The indictment does not charge that the defendant did not rely upon the reports of the engineers, managers, superintendents and agents of the companies mentioned in the indictment as to the facts set forth in the letters, circulars, documents and reports, alleged to have been deposited in the postoffice of the United States by the defendant;

(h) The indictment does not charge that there was any intent on the part of the defendant to carry out by means of correspondence a scheme or artifice to defraud, nor that the defendant deposited letters in the postoffice of the United States in the carrying out of the alleged scheme or artifice to defraud;

(i) The indictment is ambiguous and repugnant, and does not clearly or distinctly set out the circumstances by which the fraud was to be accomplished;

(j) The indictment charges that C. E. Mitchell had devised a scheme or artifice to defraud, but the fraudulent acts constituting the carrying out of said alleged scheme or artifice to defraud are alleged to have been the acts of the C. E. Mitchell Company, a corporation.

II.

The Court erred in denying the defendant's motion for a bill of particulars, and for an inspection of the papers on which the Government relied for its conviction, which prevented the defendant from be-

ing able to properly prepare for trial.

III.

The Court erred in admitting in evidence over the objection of the defendant's counsel the following questions propounded by counsel for the Government to the witness Scrafford; also the answers of said witness thereto:

Q. Mr. Scrafford, I call your attention to a statement of the circular signed by the C. E. Mitchell Company, written about April 11th, 1907, reading as follows: "The Snowstorm pays **[129]** its profits from ore that nets ten dollars. East Snowstorm is opening ore with every shot that averages over $50 in value." Is that a true statement of conditions as they obtained in East Snowstorm?

A. As far as I know it is not.

Q. Was there any such ore as that extracted from that mine any time you were working there?

A. Not that I had ever sampled.

Q. "The East Snowstorm has ore in its tunnel now assaying as high as $105?" **[130]**

A. That might be true.

Q. Well, would that be—would that statement be true of the average, or just of the samples?

Mr. NUZUM.—That does not say samples, Mr. Cain. It says "assaying from as high"—it does not say what average.

The COURT.—It is for the jury to say what impression the party intended to convey by that letter. Overrule the objection.

Exception allowed.

IV.

The Court erred in admitting in evidence over the objection of counsel for defense the following questions propounded by the counsel for the Government to the witness Schrader; also the answers of said witness thereto;

Q. Mr. Schrader, have you ever made any examination of the Coeur d'Alene Eagle mining claim?

A. Yes, sir.

Q. When did you make that examination?

A. It is about a year ago in April.

Q. State the extent of the examination you made.

A. I looked over nearly all of the property—all of the most important part of it, and with considerable detail around the main workings.

Mr. NUZUM.—Move to strike the answer where he says he looked over the most important part of it—that is inadmissible.

The COURT.—Overrule the objection. You can find out what he meant by that on cross-examination.

Exception.

V.

The Court erred in admitting in evidence over the objection of defendant's counsel, the following questions propounded by the counsel for the Government to the witness Schrader; also the answers of the witness thereto:

Q. I now call your attention to a statement in Plaintiff's **[131]** Exhibit #44. Speaking of some samples, it says: "We sent these to the assayer and

got the assays late last night; it yielded $71.66 copper and $16.48 silver, a total value of $88.14 per ton. As the ore is all exactly alike in appearance it is not possible to make a selected sample, and we believe this is a fair test of the value of the ore." State what the fact is as to the ore all being alike in appearance and not possible to make a selected sample.

A. Well, I couldn't find any ore in the workings at all; the mineral which I did find was carefully picked, a little bit here and a little bit there, and it might assay pretty high in values, but there is nothing there in a workable quantity that would approach anything like that, or nothing that I would consider workable ore.

Mr. NUZUM.—Move to strike the answer as not responsive at all—not responsive to the question.

The COURT.—The first part of the answer is, I think, but the latter part I do not think is responsive. It will be stricken.

Q. Taking into account the manner in which the metal is distributed through the rock—I will ask you if in your opinion there is anything to indicate that the Coeur d'Alene Eagle would ever be a mine from which ore could be extracted in paying quantities?

Mr. NUSUM.—Object—I don't think the examination that he has made of it would be sufficient for him to pass an opinion on.

The COURT.—Overrule the objection.

Exception allowed.

A. I do not think it is.

VI.

The Court erred in admitting in evidence over the objection of defendant's counsel, the following questions propounded by counsel for the Government to the witness Wagner; also the answers of said witness thereto: [132]

Q. Do you know about the purchase of the Reliance mine? A. Yes, sir.

Q. Did you go to the mine with anyone before it was purchased? A. Yes, sir.

Q. With whom?

A. I went with Mr. Dunn, Professor Aughey and two other gentlemen.

Q. Did you have any talk with Mr. Mitchell about the purchase of it? A. Not at that time.

Q. Well, at any time before it was purchased?

A. Yes.

Q. Concerning the purpose for which you were purchasing and incorporating the company?

A. Yes.

Q. What did Mr. Mitchell say with reference to the purpose?

Mr. NUZUM.—What time was this?

Q. Was this at or about the time of the purchase?

A. This was after the purchase of the property that I was talking to Mr. Mitchell about it, that is, about the Reliance, because I had never seen the ground until the day it was purchased.

The COURT.—What date was it?

A. Well, it was in the spring or about March, 1907, I think.

Q. What did he say?

Mr. NUZUM.—Object to any conversation at that time, if your Honor please—that *it more* than three years prior to the filing of this indictment.

The COURT.—I will dispose of that question when I come to charge the jury. I think they have a right to go into transactions prior to that time, although in the final disposition of the case the jury will have to be limited. I think the question is competent to give color to later transactions. Objection overruled. **[133]**

Exception allowed.

Q. What did he say as to the purpose for which it had been bought?

A. He said that he had bought it to get some more cheap stock.

VII.

The Court erred in admitting in evidence, over the objection of counsel for defendant, the following questions propounded by counsel for the Government to the witness Wagner; also the answers of said witness thereto:

Q. Did you ever hear him make any statement about selling mining stock by mail and still being able to control the mine? A. Yes.

Q. What statement did he make about that?

A. He said the stockholders never could get together that way, they were scattered so.

Mr. NUZUM.—I move to strike that as immaterial. That is not within the issues. A man don't want to lose the control of a mine. I couldn't anti-

cipate what the answer would be—he says now he would rather sell it and have the stock scattered, because the stockholders couldn't get together and take the control away from him—that is not within the charge of the indictment. Move to strike that as incompetent.

The COURT.—The motion will be denied.

Exception allowed.

VIII.

The Court erred in admitting in evidence all of the letters, circulars, reports and documents prepared and sent out more than three years prior to the return of the indictment and filing thereof.

IX.

The Court erred in admitting in evidence all letters, circulars, reports and documents not set out in the indictment.

X.

The Court erred in admitting in evidence those certain **[134]** letters referring to the Columbia River Marble Company, in this, to wit:

(a) That said letter was written, mailed and received more than three years prior to the return or filing of the indictment;

(b) That there is no evidence establishing, or tending to establish, any connection, either direct or indirect, of this letter with the alleged fraudulent scheme or artifice to defraud set out in the indictment, or in the alleged fraudulent acts executed in the carrying out of said alleged scheme or artifice to defraud.

XI.

The Court erred in admitting in evidence that certain letter, dated in 1904, and addressed to one George D. Needy, in this, to wit:

(a) That said letter was written, mailed and received more than three years prior to the return or filing of the indictment;

(b) That said letter was written, mailed and received outside of the State of Washington, and beyond the jurisdiction of this Court;

(c) That there is no evidence establishing, or tending to establish, any connection, either directly or indirectly, of this letter with the alleged fraudulent scheme or artifice to defraud set out in the indictment, or in the alleged fraudulent acts executed in the carrying out of said alleged scheme or artifice to defraud.

XII.

Referring particularly to the instructions of the Court, the Court erred in giving the following instructions, to wit:

"Under this section three matters of fact must be charged in the indictment, and established by the evidence at the trial. First: That the defendant devised a scheme or artifice to defraud; second: that such scheme or artifice to defraud was to be effected by correspondence or communication with another person by means of the postoffice establishment of the United States, and, third, that in carrying out such scheme or artifice to defraud the defendant deposited, or caused to be deposited, a letter in the

postoffice of the United States. These three elements are set forth in the indictment in this case, and the [135] question for your determination is, are they established by the evidence? I do not understand that there is any substantial controversy as to the second and third elements of the crime here charged. It appears from the testimony without apparent contradiction that the postoffice establishment of the United States was used extensively by the defendant for the purpose of promoting the business in which he was engaged, and there seems to be no question that he at all times intended to so use it. It is likewise conceded that the defendant deposited in the postoffice of the United States the three letters specifically set forth in the three counts of the indictment."

This instruction is misleading, confusing and does not correctly state the law in this, to wit:

(a) The first and second elements under this instruction are so interwoven that the admission of the second element of the offense charged is an admission and affirmance of the existence of the first element; the first and third elements, under this instruction, are also so interwoven that the admission of the existence of the third element is an admission and affirmance of the existence of the first element, so that when the Court instructed—"I do not understand that there is any substantial controversy as to the second and third elements of the crime here charged"—he, in effect, instructed the jury that there was no substantial controversy as to the guilt

of the defendant;

(b) The Court transcended his powers in taking from the jury, by this instruction, the second and third elements of the offense charged;

(c) The Court assumes the existence of the intent to defraud, which should have been submitted to the jury for their determination;

(d) This instruction further assumes that the business in which the defendant was engaged was the fraudulent scheme or artifice to defraud, as set forth in the indictment, and further assumes that the mailing of the letters was sufficient to constitute the second and third elements above referred to in the instruction.

(e) The instruction fails to instruct the jury that the evidence **[136]** must be sufficient to convince them beyond a reasonable doubt.

XIII.

"I will now revert to the first and most important element of the offense charged, namely, the devising of a scheme or artifice to defraud."

This instruction is misleading, confusing and does not correctly state the law, in this, to wit:

(a) That the gist of the offense is the use, or attempted use of the United States mail for the forbidden purpose, and not the devising of a scheme or artifice to defraud, as charged. This instruction limits the instructions following to one question, namely: The devising of a scheme or artifice to defraud.

XIV.

"For the purpose of these instructions, I deem it sufficient to say that the scheme or artifice to defraud, devised by the defendant Mitchell as charged by the indictment, is substantially as follows: That the said Mitchell would cause to be incorporated the C. E. Mitchell Company, to be controlled and directed by him, for the alleged purpose of buying, selling and operating mines, quarries, mills, stores and conducting a general brokerage business in stocks; that said Mitchell would also secure the incorporation of the various other companies named in the indictment to conduct a mining business; that he would procure from such companies stocks which he would sell and dispose of by means of false and fraudulent representations, as set forth in the indictment; that he would represent and pretend that he had knowledge at first hand, of the actual present and prospective values of the properties and assets of said various companies, their development and progress, and that the development of the properties of said various companies was under the control and direction of the said C. E. Mitchell and said C. E. Mitchell Company; that the stocks of the said various companies was of great value and would become of still greater value; that the properties owned by said various companies were of great value and would become of still greater value; that said companies had ore that could be shipped in paying quantities; that the stock of said companies was being offered for sale to secure funds to develop and equip

the said properties; that the proceeds from the sale of all stocks of said companies were to be used to develop and equip said properties; that the stock of said respective companies would greatly enhance in value, and that said companies would pay dividends; that the said C. E. Mitchell well knew that all the aforesaid representations so made by him, and by and in the name of the C. E. Mitchell Company, under his direction were misleading, false, untrue and fraudulent; that the stock of said various companies was not of the value so represented, and would not increase in value and become of greater value; that the properties of the said various corporations were not of the value so represented, and would not become of greater value; that said companies did not have ore capable of being shipped in paying quantities, and that the corporations would not pay dividends; that the proceeds from the sale of the stock of said companies would **[137]** not be used to develop the properties of said companies, but the same would be, and it was intended by the said C. E. Mitchell that a large part of the proceeds from the sale of the stock of said various companies would be by him fraudulently converted to his own use, and that it was the intent of the said C. E. Mitchell to fraudulently convert the moneys so obtained, or a large portion thereof, to his own use; which said scheme and artifice to defraud, devised by said Mitchell, was to be effected by opening correspondence and communication by means of the postoffice establishment of the United States with divers per-

sons as might or could be induced to answer his advertisements, and to whom might be addressed the many circulars, reports and letters so sent and to be sent through the mails of the United States by the said C. E. Mitchell and the C. E. Mitchell Company by his direction; and that in and for executing the said scheme and artifice to defraud the said Mitchell did unlawfully deposit and cause to be deposited in the postoffice of the United States, in the City of Spokane, Spokane County, Washington, the three certain letters set forth in the three counts of the indictment."

This instruction is erroneous, ambiguous, confusing and misleading, and is not a correct or proper summary or synopsis of the charging part of the indictment, in this, to wit:

(a) The indictment charges that C. E. Mitchell had devised a scheme or artifice to defraud; intending in the execution and carrying out of said scheme or artifice to defraud to open and conduct correspondence by means of the postoffice establishment of the United States. The indictment then sets out the method of procedure resorted to by the said C. E. Mitchell in the executing and carrying out of the scheme and artifice to defraud (as found by them in the indictment to have been in existence), the various steps alleged to have been taken by the said C. E. Mitchell in the consummation and carrying out of said alleged scheme or artifice to defraud. On the other hand, the instructions instruct the jury that the charging part of the indictment relates to

the devising of the scheme or artifice to defraud.

(b) The instruction is further confusing in that no distinction is made between the alleged false representations made by C. E. Mitchell and those alleged to have been made by the C. E. Mitchell Company. The indictment charges that certain alleged misrepresentations were made by the said C. E. Mitchell, while other alleged misrepresentations are alleged to have been made by the C. E. Mitchell Company, but in the instruction **[138]** above given the Court has failed to differentiate between these alleged misrepresentations as alleged to have been made by the C. E. Mitchell Company, and those alleged to have been made by C. E. Mitchell, and charges all of said alleged misrepresentations as being the misrepresentations of C. E. Mitchell.

(c) The instruction charges that "said Mitchell would cause to be incorporated the C. E. Mitchell Company, to be controlled and directed by him, for the alleged purpose of buying, selling and operating mines, quarries, mills, stores and conducting a general brokerage business in stocks; that said Mitchell would also secure the incorporation of the various other companies named in the indictment to conduct a mining business; that he would represent and pretend that he had knowledge at first hand of the actual, present and prospective value of the properties and assets of said various companies, their development and progress, and that the development of the properties of said various companies was under the control and direction of said C. E. Mitchell and said C. E. Mitchell Company," * * *, and then charges

"that the said C. E. Mitchell well knew that all the aforesaid representations so made by him, and by and in the name of the C. E. Mitchell Company, under his direction, were misleading, false, untrue and fraudulent."

The indictment does not charge that the representations that "Mitchell would cause to be incorporated the C. E. Mitchell Company, to be controlled and directed by him for the alleged purpose of buying, selling and operating mines, quarries, mills, stores and conducting a general brokerage business in stocks" was a false representation. Nor does the indictment charge that the representation "that said Mitchell would also secure the incorporation of various other companies, named in the indictment, to conduct a mining business," was a false representation. On the contrary, the indictment specifically charges that these acts were done in executing and carrying out the scheme and artifice to defraud. [139]

The same is true of the representation "that he would represent and pretend that he had knowledge at first hand of the actual, present and prospective value of the properties and assets of the said various companies, their development and progress," and "that the development of the properties of said various companies was under the control and direction of the said C. E. Mitchell and the C. E. Mitchell Company."

XV.

"Now, gentlemen of the jury, if you are satisfied from the testimony in this case, beyond a reasonable

doubt, that the defendant made one or more of the false representations charged in the indictment, in the sale of the mining stocks therein described, and that such false representations were so made in pursuance of a scheme or artifice to defraud previously devised by the defendant, which was to be effected by correspondence or communication with another person by means of the postoffice establishment of the United States and that in and for executing such scheme or artifice, the defendant deposited in the postoffice of the United States the several letters described in the different counts of the indictment, you will find the defendant guilty as charged."

This instruction is misleading, ambiguous and does not correctly state the law, in this, to wit:

(a) The jury is told that if the defendant made one or more of the false representation charged in the indictment in the sale of the mining stock therein described that they "will" find him guilty. This is especially objectionable when considered with the instructions immediately preceding this instruction. The last three instructions taken together are misleading, confusing, ambiguous and do not correctly state the law, either when considered separately or together.

XVI.

"Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows resort to circumstances as a means of ascertaining the truth. And in such cases great latitude is justly allowed by the law to the reception of indirect or circumstantial

evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but also supplying protection against imposition. When the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored for the reason that the force and effect of circumstantial facts usually and almost necessarily depends upon their connection with each other. Circumstances altogether inconclusive if separately considered [140] may, by their number and joint operation, established or corroborated by minor coincidences, be sufficient to constitute conclusive proof."

This instruction is misleading, ambiguous and does not correctly state the law as applied to the facts in this case.

XVII.

"The case of fraud, as here stated, is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge."

This instruction is misleading, erroneous and does not correctly state the law as applied to this case.

XVIII.

"Before you find the defendant guilty, therefore, you must find that the offense was committed within the three years next preceding the return of the indictment. It is not necessary, however, that the Government should prove that the scheme or artifice to defraud was devised within three years. If you

find that such a scheme or artifice was devised more than three years prior to the return of the indictment, but that the scheme or artifice was still in existence and the defendant was operating under it within the three years, the case is still without the statute of limitations and may be prosecuted. It was for this purpose that certain letters were received in evidence which were written more than three years prior to the return of the indictment, and they can only be considered for the purpose of enabling you to determine whether or not there was in fact a scheme or artifice to defraud."

This instruction was misleading, confusing and does not correctly state the law.

The Court further erred in denying defendant's motion for a new trial on account of said errors, and for the further reasons as set forth in defendant's motion for a new trial, and defendant's petition and amended motion for a new trial, and the affidavits in support thereof.

The Court had no jurisdiction to render the judgment rendered and the judgment and sentence is void.

WHEREFORE, the defendant prays that the foregoing errors be corrected, the said judgment reversed, and said cause remanded to the District Court, with directions to award the defendant a new trial of said cause and action. **[141]**

JOHN T. MULLIGAN,
F. D. ADAMS,
JOHN C. KLEBER.
ALEX WINSTON,
Attorneys for Defendant.

[Endorsements]: Service of copy of within assignment of errors admitted this 24th day of July, 1911.

OSCAR CAIN,
U. S. District Attorney.

Assignment of Errors. Filed in the U. S. District Court, Eastern District of Washington, July 24, 1911. W. H. Hare, Clerk. [142]

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. E. MITCHELL,
Defendant.

Bill of Exceptions.

Comes now the defendant, C. E. Mitchell, in the above-entitled cause, by John T. Mulligan, his attorney, and proposed the following Bill of Exceptions, and asks to have the same settled and certified to:

This cause came on to be heard before the Court and a jury duly empaneled on the 2d day of May, 1911, the plaintiff herein being represented by Oscar Cain, United States Attorney, and the defendant being represented by Messrs. Nuzum & Nuzum and Alex M. Winston, his attorneys. After a jury was empaneled and sworn to try the case, the following witnesses were called and testified substantially as follows:

[Testimony of P. G. Morgan.]

P. G. MORGAN: That he was secretary of the C. E. Mitchell Company, and held an office in most of the companies mentioned in the indictment. That although no separate books were kept of each of the individual company's accounts, the system of bookkeeping followed was such that the accounts of each of the companies was kept separate and apart.

[Testimony of John M. Scrafford.]

JOHN M. SCRAFFORD: That the Coeur d'Alene Reliance property, being one of the properties mentioned in the indictment, was worthless. That the East Snowstorm property was, he believed, on the Snowstorm ore zone or dyke. That he had written many letters to Mitchell endorsing the property, its fine showing and regarding the vein. Said there was no ore of consequence in the tunnel upon said property and not more than one hundred (100) pounds of high-grade ore was found there. That the property was only a prospect; that as to **[143]** the Coeur d'Alene Eagle there was a vein upon the property, and that the same was about nineteen (19) feet in width and that it ran the length of four (4) claims; that it was mineralized in spots and streaks; admitted a report introduced, and signed by him, in which he said, "You do not half appreciate what you have here; the stock is selling far too low at ten cents; I would take a contract to sink here and take all my pay in stock." Regarding the Montana Mammoth being another of the properties and companies

(Testimony of John M. Scrafford.)

mentioned in the indictment, verified a sworn report made by him stating that the property was the greatest outcrop he had ever seen except the "Bunker Hill & Sullivan"; denied that there was any shipping ore on surface or that there was ore that could be taken from the surface and dumps to ship. But said there was much of said ore that could be milled profitably. Explained from a photograph that the ore body lay only on surface; upon cross-examination, however, identified letters written by himself and admitted truth of statement therein to the effect that he had broken down car loads of shipping ore upon the property.

[Testimony of R. H. Dunn.]

R. H. DUNN: That he was owner of stock and was an officer in the C. E. Mitchell Company and also an officer in the various companies mentioned in the indictment; that he seldom attended meetings, being absent most of the time; that Mitchell, defendant herein attended to the office operation and he (Dunn) attended to the outside work which comprised superintendence of agencies, selling stock, and escorting parties to the mine and properties mentioned in the indictment. That the witness Scrafford was employed by the company and was instructed to investigate properties and purchase same when they seemed to justify the expenditure of purchase and development; that Scrafford visited, investigated and recommended the purchase of the Coeur d'Alene Reliance; that the C. E. Mitchell Company thereupon

(Testimony of R. H. Dunn.)

sent Professor Aughey, consulting engineer, to investigate the property, and that he (Dunn) [144] accompanied Aughey upon such investigation and that upon Aughey's favorable report the company took the property.

[Testimony of Teresa M. Wagner.]

TERESA M. WAGNER: That she entered the employ of the C. E. Mitchell Company in 1905 and advanced to the position of chief clerk and treasurer, having charge of the office, its employees, funds, etc.; that C. E. Mitchell held stockholders' meetings and trustees' meetings; that C. E. Mitchell had prepared and asked her to sign minutes as secretary, although she had not attended the meeting therein purported to have been held; was unable to identify this meeting or the name of the company so holding such meeting in this instance or any of the instances as above and upon motion of defendant's counsel this testimony was stricken; that the C. E. Mitchell Company was always short of funds and the bank account of said company was always overdrawn; that the C. E. Mitchell Company made extensive use of the United States mails and that C. E. Mitchell had said he could sell more stock by mail than all his agents could sell by personal solicitation.

[Testimony of R. A. Rodrick.]

R. A. RODRICK: That he had formerly occupied the position of vice-president of the C. E. Mitchell Company; that he was elected to such position in

(Testimony of R. A. Rodrick.)

1906, resigned same in 1908 upon the institution of investigation by the postal authorities; that his commission from the sale of stock in the various companies mentioned in the indictment were varied in amount, ranging from 20 per cent to 50 per cent; that he had entered into an agreement in 1906 with the C. E. Mitchell Company that he was to pay all office expenses at the office of the C. E. Mitchell Company in Milwaukee, together with the commission of his subagents, and was to receive 50 per cent commission on all stock sales.

[Testimony of S. R. Moore.]

S. R. MOORE: That he was United States Mineral surveyor for Idaho and Montana and a licensed land surveyor for Idaho; that he examined the mining claim known as the Coeur d'Alene Reliance group in June, 1907; that he did not consider the [145] Coeur d'Alene Reliance group of mining claims a direct extension of the Black Cloud mine; that he never saw any vein of mineral ore at the point at which they were doing their work when he was upon the property; that they encountered no vein of mineral bearing ore in any of the tunneling done on that group of claims.

[Testimony of Frank Thomas.]

FRANK THOMAS: That he was one of the organizers of the Kennedy Creek Gold Mining Company, being one of the companies mentioned in the indictment herein; that the C. E. Mitchell Company owned stock in this company; that the assets of the

(Testimony of Frank Thomas.)

Kennedy Creek Gold Mining Company were worth probably from $40,000 to $50,000; that he had not attached any special value to the water rights owned by said company, although the entire property would be worthless without the water right; regarding the statement that "The great dam makes a lake of about 20 acres extent, holding all the water needed for washing the gold" that he was not certain whether it holds all the water needed or not, but that it was of great assistance in washing the gold; that the dam was now the same height as in 1908 and would make a lake of an area of from one to two acres; was asked concerning a letter written by C. E. Mitchell, dated June 6, 1908, reading in part as follows: "In washing bedrock great veins of coal have been exposed in the bed of the creek. I stretched a tape line across fifty feet of solid coal"; and as to whether there was one solid vein at the place he replied, "No, sir"; that at a cut in bedrock of about eight feet in depth coal was encountered running at right angles to the bedrock flume, averaging in width from the thickness of a hand to four feet; that there was a large number of these; that no daily report of the Kennedy Creek Gold Mining Company was ever given to C. E. Mitchell and that if any report was given at all it was general only. Asked in relation to a letter written by C. E. Mitchell to H. H. Wells, excerpts from which were as follows: [146] "——— in the package which we send you by registered mail is a bottle of black sand which comes from the Kennedy Gold Creek placer. This

(Testimony of Frank Thomas.)

sand is a by-product of the placer mines and you will notice by reading the report covers more than the daily expense of operating"; also in relation to progress report Number 20 of the C. E. Mitchell Company, excerpts from which were as follows: "——— the property produces from one thousand to two thousand pounds of black sand per day—this sells at an average of eighty dollars per ton and pays all operating expenses, leaving all gold for dividends"; that he did not know as to the quantity of black sand taken from the property but that there was not sufficient saved to be shipped commercially and the only sand saved was for samples and assays and none was sold; that he was not conversant with placers and did not know whether the equipment of the Kennedy Creek Gold Mining Company was the best in the west or not; questioned with reference to whether or not certain statements with reference to the building of a railroad within a half mile of the workings was correct, that the Chicago, Milwaukee & Puget Sound was constructed west and was under construction at the time but the main line was not built within that distance of the property but that surveys had been run of a branch line to reach Flathead which would run somewhere within a mile and a half and half a mile of the property.

[Testimony of F. C. Schrader.]

F. C. SCHRADER, a witness for the Government: That he is a geologist in the employ of the United States Geological Survey and that he has been en-

(Testimony of F. C. Schrader.)

gaged in that occupation for about twenty years; that he had examined the formation of the country surrounding the Coeur d'Alene Reliance property, being one of the properties mentioned in the indictment; that he had been to the Black Cloud mine but that he had not been in said mine; that there was no mineral vein in the Coeur d'Alene Reliance property; as to whether the statement in Progress Report Number 36, "——— the property (referring to [147] the Coeur d'Alene Reliance) is the direct western extension of the Black Cloud California Mine" was or was not true stated that "it joins the California property, I believe—very closely to it"; asked as to the truth of the statement in the Coeur d'Alene Reliance Prospectus "——— we have over 3,000 feet of the Black Cloud vein cropping boldly through three claims"; that such statement was absolutely false; that in the tunnels which he examined on the Coeur d'Alene Reliance group he did not encounter any ore body; that he had not made the assays of the ores himself but delivered them to the C. M. Fassett Company of Spokane. That he made an examination of the East Snowstorm Mining property, being one of the properties referred to in the indictment, a year ago in April, and a re-examination in September, 1910; that he took four or five samples and submitted them to the Fassett Company; that there were three tunnels and he examined all of them; that he meant by the word "ore" the "occurrence of mineral in a commercially workable

(Testimony of F. C. Schrader.)

amount" and that under that definition of the word "ore" there was none there. That he had examined the Montana Mammoth mine, being one of the properties mentioned in the indictment, about April, and made a re-examination about September, 1910; that he examined the tunnels on that property and that there was only one tunnel of consequence, which answer, upon motion of defendant's counsel, was stricken; that the tunnel ran into slaty, shalistitic rock; that he took samples from the mine; asked as to the truth of statement, dated November 27, 1907, as follows: "Every opening we have made on the surface from the foot of the mountain up to this point has been in ore—good ore, all ore," stated that this was untrue; asked as to the truth of statement under date of December 2, 1907, as follows: "The fact that the mine is now putting on the dump enough ore every day to pay several days' operating expenses means that we do not have to sell a dollar's worth of stock to pay for development," stated that [148] this was untrue; asked as to the truth of statement made in Progress Report Number 14, August, 1907, referring to a statement of John M. Scrafford, "Quoting from Doctor J. A. McLaughlin, of Dayton, Washington, the writer visited the Montana Mammoth and found a vein 40 feet in width at the tunnel mouth with wonderful surface showings. More than 1,000 tons of ore can be taken from the surface and dump and shipped to the smelter at once," that this statement was untrue as to the quantity of ore

(Testimony of F. C. Schrader.)
on the dump. This testimony was allowed over the objection of counsel for defendant and *and* exception duly allowed. That about one-hundredth of a per cent of the tunnel progressed through rock of that character, the intervening rock being mostly country rock. That he had examined the German American Mining prospect, being one of the properties mentioned in the indictment; that such examination was made in April, 1910; that there was considerable work done on the property; that he did not see any vein on the property; that the character of formation was simply the ordinary sandstone rock mixed with a little quartzite and limestone; that there was very little indication of mineral, that at one point the tunnel had crossed a more or less silicious belt containing some quartz in the rock. That he had made an examination of the Coeur d'Alene Eagle Mining property, being one of the properties mentioned in the indictment; that this examination was made in April, 1910; that he had examined nearly all of the property, "all of the most important part of it and with considerable detail around the main working." This testimony was admitted over the objection of defendant's counsel as to the phraseology "most important part of it." That the width of the vein was about fourteen or fifteen feet; that he took samples of the ore—one from the hanging wall side of each side of the tunnel and chamber and one from the drift and that these were given to the Fassett Company for assays; as to the statement made [149]

(Testimony of F. C. Schrader.)

wherein in speaking of samples it is said: "We sent to the assayer and got the assay late last night; it yielding $71.66 copper and $16.46 silver, a total value of $88.14 per ton. As the ore is all exactly alike in appearance, it is not possible to make a selected sample and we believe this is a fair test of the value of the ore," that he could not find any ore in the workings at all and nothing there that would approach that in a workable quantity. The answer was stricken upon motion of counsel for the defendant upon the ground that it was not responsive to the question. That in his opinion there was nothing to indicate that the property would ever be a mine. This answer was allowed over objection of defendant's counsel and exceptions duly allowed. That he had examined the Kennedy Creek placer, being one of the properties mentioned in the indictment; that there was coal there in three beds but that he had made no detailed examination of same: that his impression was that the thickest vein did not much exceed two and one-half feet but that he had not measured the vein and this was his impression from observation; that he did not see any coal veins there fifty feet wide but said the coal measure was as wide as the courtroom.

[Testimony of William McNorton.]

WILLIAM McNORTON: That he was chief stockholder of the Montana Mammoth Mining Company, being one of the companies mentioned in the indictment, and that he had formerly owned the

(Testimony of William McNorton.)

property; asked as to whether he had ever shipped a package of ore from this property to anyone replied that he did not remember and was excused.

[Testimony of V. K. Wagner.]

V. K. WAGNER, a witness called for the Government: That he was in the employ of the C. E. Mitchell Company on a commission basis for about two years, beginning in 1906 and continuing intermittently up to 1910; that he was conversant with the purchase of the Coeur d'Alene Reliance property, being one of the properties mentioned in the indictment; that he visited the property before it was purchased in company **[150]** with Mr. Dunn, Professor Aughey and two other gentlemen; that he had talked with C. E. Mitchell about his purchase several times prior to the time of the purchase and that he talked to Mitchell about it after the purchase about March, 1907; that he had never seen the property until the day it was purchased. This conversation was objected to by defendant's counsel and admitted over such objection and exceptions duly allowed; that Mitchell said he bought it to get some more cheap stock; that during the time he was engaged in selling stock for the company that Mitchell directed him to send out Black Cloud ore as specimens of ore from the Coeur d'Alene Reliance property; that he obtained Black Cloud ore at his own wish and also at Mitchell's request and sent it out as specimens of Reliance ore and he supposed this was at Mitchell's request. This answer was ordered stricken unless he knew.

(Testimony of V. K. Wagner.)

He then stated that at one time Mitchell had told him "we could just as well send out that Black Cloud ore we had as we were getting the same kind of ore from the Reliance at the present time, so I personally helped send some of it out myself"; that this was done at Mitchell's direction; asked whether he had ever heard Mitchell say anything about holding a "directors' meeting of any of these corporations" or of the C. E. Mitchell Company when there was nobody there but himself, that he had on one occurrence; that Mitchell had told him he could sell more mining stock by mail than the rest could by solicitation; that Mitchell said that he could sell stock by mail and the stockholders would be so scattered they could never get together and take away control. This was objected to and motion to strike was interposed by counsel for defense but motion was overruled and exception duly allowed; later the Court referred to this testimony and sustained the motion to strike and so instructed the jury. That Mitchell had told him he was going to sell a lot of Reliance stock and develop another property which he thought was the property in Nevada; this reply was **[151]** stricken upon objection of counsel for the defense. That he remembered two occasions upon which Mitchell asked him to sell stock in certain companies for the use of other properties, once Kennedy Creek, which he had not so sold and once East Snowstorm, but on cross-examination that Mitchell had asked him to sell East Snowstorm to be used on

(Testimony of V. K. Wagner.)

East Snowstorm development as he was short in the treasury of that company; that witness had made misrepresentations to his friends and had defrauded them out of money and that he made the misrepresentations knowingly, intentionally and dishonestly.

[Testimony of John L. Dwyer.]

JOHN L. DWYER, a witness for the Government: That at the request of C. E. Mitchell he sent out samples of ore from the Anaconda Mine which were labeled as samples from the Montana Mammoth; that Mitchell offered him two hundred ($200.00) dollars and a ticket if he would go over to British Columbia until this trial was over. On cross-examination: that Mitchell had sent him, to Billings, Montana, a ticket from that point to Spokane and five ($5.00) dollars in response to his request in a postal card written to witness for the defendant, Cornish, so that he might be present and testify at this trial.

[Testimony of Samuel Aughey.]

SAMUEL AUGHEY, a witness for the defense: That he was formerly professor in the University of Nebraska and is an expert in mineralogy, chemistry and geology, with many years' experience in mining countries; that he was engaged by the defendant to examine the property and to make assays of the ores found in the various mining properties mentioned in the indictment; that he identified reports which he had prepared at the request of the defendant on the

(Testimony of Samuel Aughey.)

Coeur d'Alene Reliance, Coeur d'Alene Eagle, Ophir or East Snowstorm, German American, Montana Mammoth and Kennedy Creek Gold Mining Company's properties, being all the properties mentioned in the indictment, and that the facts therein stated were true and that the assays were accurate and correct and that in assaying he [152] used pound samples whenever possible instead of the ounce samples used by most assayers; that the equipment of the Kennedy Creek Gold Mining property was the best he had seen in the northwest; that the Black Cloud vein extends into the Coeur d'Alene Reliance group; that on the Coeur d'Alene Eagle the vein outcrops boldly but irregularly because it is following the contour of the hill and that the vein was traceable on the surface for three-quarters of a mile; that he considered it *very* probable that the Snowstorm vein extends into the East Snowstorm property.

[Testimony of William McCullough.]

WILLIAM McCULLOUGH: That he was the superintendent of the East Snowstorm Mining Company, one of the properties mentioned in the indictment; that the development consists of five tunnels, an old one about 130 feet long, tunnel number 1 about 132 feet long, tunnel number 2, 600 feet long with numerous cross-cuts, tunnel number 3, 365 feet long with two cross-cuts and tunnel number 4, 45 feet long; that he had compared samples from the East Snowstorm and the Snowstorm mine and found them to be the same; that he considered the East

(Testimony of William McCullough.)

Snowstorm a mine; that when F. C. Schrader, a witness for the Government, made his second visit to the East Snowstorm Schrader said "The old tunnel is all right and if number 3 assays good everything is O. K."

[Testimony of John Mocine.]

JOHN MOCINE: That he is a mining engineer, graduate of the Oregon State College, a mining man of thirteen years' active experience and for three years superintendent of the Snowstorm mine; that he had inspected the property of the East Snowstorm Mining Company and that the East Snowstorm showed rock carrying copper; that in his opinion the Ophir claim of the East Snowstorm group was worth developing and that it was very probable that the Snowstorm vein extended into the East Snowstorm property; that in his opinion assays should be taken every ten feet to ascertain values in development of 1700 feet along any vein and that seven assays from such workings, [153] such as the prosecution had taken, were insufficient to form an accurate idea of the value of the ore.

[Testimony of J. F. Pasold.]

J. F. PASOLD, that he has been engaged in mining for many years and that the ore found in the Snowstorm and the East Snowstorm are similar and that the Snowstorm vein runs into the East Snowstorm ground; that he had examined the Montana Mammoth property and had found concentrating

(Testimony of J. F. Pasold.)

ore in the tunnels and milling ore in the dump and about twelve tons of shipping ore in the bin; that the property is a mine, technically speaking, but practically speaking "a mighty good prospect"; that the manner of sampling a mine as stated by witness Schrader for the Government is wholly inadequate.

[Testimony of William McNorton.]

WILLIAM McNORTON: That he is the principal stockholder in the Montana Mammoth Mine and was owner of the property for twenty-two years prior to its incorporation; that he was familiar with the prospectuses and progress reports of the C. E. Mitchell Company and considered the statements regarding Montana Mammoth fully justified in every case therein and particularly that statement that more than 1,000 tons of ore could be gathered from the surface and dumps and shipped; that the witness Schrader was enthusiastic regarding the property when he visited it at both times and that Schrader claimed the two hundred pounds of rock which Schrader took out of the big tunnel on his first visit to the mine was all mineralized, whereas the witness Schrader testified that it had no mineral at all.

[Testimony of Millard Hosea.]

MILLARD HOSEA: That he visited the Coeur d'Alene Eagle property as one of a large party and that the vein was in his opinion 19 feet wide in the tunnel and was heavily mineralized.

[Testimony of J. S. Payne.]

J. S. PAYNE: That he is a mining engineer and that he visited the Coeur d'Alene Eagle property on behalf of George M. Nethercutt, a Spokane attorney, and reported favorably upon the property; that he bought a block of stock in same for himself, that the vein was about twenty feet wide in the tunnel and was heavily mineralized. [154]

[Testimony of George W. Cornish.]

GEORGE W. CORNISH: That he is a mining engineer and that he had visited the East Snowstorm and was familiar with all of the circulars and progress reports issued from time to time by the C. E. Mitchell Company regarding this property and that all statements made therein were correct and particularly the claim of the C. E. Mitchell Company that the East Snowstorm is a mine; that he visited the Kennedy Creek Gold Mining property twice and closely investigated the coal deposit thereon: that there was one body of coal at least forty feet wide; that the body of water back of the dam would be more than twenty acres if the dam were completed as planned by the company; that he visited the Montana Mammoth several times and inspected it thoroughly and was familiar with the reports of the C. E. Mitchell Company regarding same and that said reports were correct to his knowledge; that he considered the Montana Mammoth a proven mine; that he had large experience in sampling mines and con-

(Testimony of George W. Cornish.)
demned the method of the witness Schrader in reference to sampling.

[Testimony of James V. Harvey.]

JAMES V. HARVEY: That he is telegraph editor of the Spokane Chronicle; that he was employed as publicity manager for the C. E. Mitchell Company from April to October, 1907; that his instructions received from C. E. Mitchell were that he should always tell the exact facts and in order that he might be fully informed he was frequently sent to the properties to make personal inspection.

[Testimony of J. C. Weatherhead.]

J. C. WEATHERHEAD: That he is manager of the Pandora Mine and that it adjoins the East Snowstorm on the west, lying between the East Snowstorm and the Snowstorm; that the Snowstorm vein runs from the Snowstorm into the Pandora and from the Pandora into the East Snowstorm for the length of four claims and that the number 3 tunnel on the East Snowstorm is being extended in this vein and has already exposed considerable ore in streaks and bands; that the method of sampling employed by witness Schrader is valueless. [155]

[Testimony of James M. Boyd.]

JAMES M. BOYD: That he is a mining engineer with over twenty years' practical experience as a miner, operator and promoter; that he would have no confidence in sampling as done by the witness Schrader; that commissions on mining stock sales

(Testimony of James M. Boyd.)
and mining deals were never uniform and ranged from 10 to 60 per cent.

[Testimony of Frank Thomas (Recalled).]

FRANK THOMAS, a witness called by the Government was recalled by the defendant: That he remembered a conversation held with Mitchell in April, 1908, while the two were standing at the dam site on the Kennedy Creek Gold Mining Company's property in which he remembered discussing the size of the lake or reservoir that would be created when the dam was raised to the full height as planned by the company and that such lake would be not less than twenty acres in extent; that while the company had not saved or shipped any black sand, it was arranging to do so when the flood came in June, 1908, and swept away all the flumes and sluices; that there was coal in seams and bands showing in the creek bed and at a distance from the lowest to the highest of such showings was over seven hundred feet and that there might have been one body of fifty feet of coal later covered by the debris of the flood which he had not measured.

[Testimony of R. A. Rodrick (Recalled).]

R. A. RODRICK, a witness called for the Government was recalled by the defendant: That he had received samples of Black Cloud ore from the C. E. Mitchell Company in the spring of 1907; that same were never labeled Coeur d'Alene Reliance; that he never had been misled or misinformed as to said ore.

[Testimony of C. E. Mitchell.]

C. E. MITCHELL, defendant, identified letters, assay certificates, circulars, progress reports, telegrams, documents, and ore samples; in regard to the manner of securing the various properties mentioned in the indictment that in each case he had depended upon the reports of one or more mining engineers and had used their reports in the promotion of the properties; that he believed these reports to be true and he depended upon [156] same; that he had in most cases confirmed said reports by personal investigation of the properties as well as through the expressed opinion of many shareholders who visited these mines; that he never knowingly made any untruthful statement regarding any of the properties mentioned in the indictment; he denied absolutely the testimony of Dwyer, Wagner and each and every witness produced by the Government whose testimony tended in any manner to impute to him any dishonest act in connection with the promotion of any of the companies or corporations mentioned in the indictment and denied absolutely that he ever formed or intended to form a scheme or artifice to defraud of any kind or character or that he used or intended to use the postoffice establishment of the United States in the furtherance or execution of any scheme or artifice to defraud of any kind. That he always conducted the business in an honest and open manner, having full faith in all the properties that he was promoting and believing at all

(Testimony of C. E. Mitchell.)

times that investments made by various investors would be productive of profitable results and believed at all times that all of the statements and representations made by him were in all respects true.

[Exceptions to Instructions and Assignments of Error, etc.]

REFERRING to the instructions of the Court, the defendant excepts to each and every part of the instructions hereinafter copied in this bill of exceptions and assigns as error the reasons as set forth in this bill of exceptions, excepting generally and specifically to each and every part of said instructions. The following instruction was duly, regularly and timely excepted to, and exception thereto duly allowed, to wit:

I.

"Under this section three matters of fact must be charged in the indictment, and established by the evidence at the trial. First: that the defendant devised a scheme or artifice to defraud; second: that such scheme or artifice to defraud was to be effected by correspondence or communication with another [157] person by means of the postoffice establishment of the United States, and, third: that in carrying out such scheme or artifice to defraud the defendant deposited, or caused to be deposited, a letter in the postoffice of the United States. These three elements are set forth in the indictment in this case, and the question for your determination is are they

established by the evidence. I do not understand that there is any substantial controversy as to the second and third elements of the crime here charged. It appears from the testimony without apparent contradiction that the postoffice establishment of the United States was used extensively by the defendant for the purpose of promoting the business in which he was engaged, and there seems to be no question that he at all times intended to so use it. It is likewise conceded that the defendant deposited in the postoffice of the United States the three letters specifically set forth in the three counts of the indictment."

This instruction is misleading, confusing and does not correctly state the law in this, to wit:

(a) The first and second elements under this instruction are so interwoven that the admission of the second element of the offense charged is an admission and affirmance of the first element; the first and third elements, under this instruction, are also so interwoven that the admission of the existence of the third element is an admission and affirmation of the existence of the first element, so that when the Court instructed, "I do not understand that there is any substantial controversy as to the second and third elements of the crime here charged," he, in effect, instructed the jury that there was no substantial controversy as to the guilt of the defendant.

(b) The Court transcended his power in taking from the jury by this instruction the second and third elements of the offense charged.

(c) The Court assumes the existence of the in-

tent to defraud which [158] should have been submitted to the jury for their determination;

(d) This instruction further assumes that the business in which the defendant was engaged was a fraudulent scheme or artifice to defraud, as set forth in the indictment, and further assumes that the mailing of the letters was sufficient to constitute the second and third elements above referred to in the instruction.

(e) The instruction fails to instruct the jury that the evidence must be sufficient to convince them beyond a reasonable doubt.

II.

The following instruction was duly, regularly and timely excepted to and exception thereto duly allowed, to wit:

"I will now revert to the first and most important element of the offense charged, namely, the devising of a scheme or artifice to defraud."

This instruction is misleading, confusing and does not correctly state the law in this, to wit:

(a) That the gist of the offense is the use or attempted use of the United States mail for the forbidden purpose and not the devising of a scheme or artifice to defraud, as charged. This instruction limits the instructions following to the one question, namely: the devising of a scheme or artifice to defraud.

III.

The following instruction was duly, regularly and timely excepted to and exception thereto duly al-

lowed, to wit:

"For the purpose of these instructions, I deem it sufficient to say that the scheme or artifice to defraud, devised by the defendant Mitchell, as charged by the indictment, is substantially as follows: That the said Mitchell would cause to be incorporated the C. E. Mitchell Company, to be controlled and directed by him, for the alleged purpose of buying, selling and operating mines, quarries, mills, stores and conducting a general brokerage business in stocks; that said Mitchell would also secure the incorporation of the various other companies [159] named in the indictment, to conduct a mining business; that he would procure from such companies stocks which he would sell and dispose of by means of false and fraudulent representations as set forth in the indictment; that he would represent and pretend that he had knowledge at first hand, of the actual, present and prospective values of the properties and assets of said various companies, their development and progress, and that the development of the properties of said various companies was under the control and direction of the said C. E. Mitchell and the said C. E. Mitchell Company; that the stocks of said various companies were of great value and would become of still greater value; that the properties owned by said various companies were of great value and would become of greater value; that said companies had ore that could be shipped in paying quantities; that the stock of said companies was being offered for sale to secure funds to develop

and equip the said properties; that the proceeds from the sale of all stocks of said companies were to be used to develop and equip said properties; that the stock of said respective companies would greatly enhance in value and that said companies would pay dividends; that the said C. E. Mitchell well knew that all the aforesaid representations so made by him by and in the name of the C. E. Mitchell Company, under his direction, were misleading, false, untrue and fraudulent; that the stock of said various companies was not of the value so represented and would not increase in value and become of greater value; that the properties of the said corporations were not of the value so represented, and would not become of greater value; that said companies did not have ore capable of being shipped in paying quantities, and that the corporations would not pay dividends; that the proceeds from the sale of the stock of said companies would not be used to develop the properties of said companies, but the same would be, and it was intended by [160] the said C. E. Mitchell that a large part of the proceeds from the sale of the stock of the said various companies would be by him fraudulently converted to his own use, and that it was the intent of the said C. E. Mitchell to fraudulently convert the money so obtained, or a large portion thereof, to his own use; which said scheme and artifice to defraud devised by said Mitchell, was to be effected by opening correspondence and communication by means of the postoffice establishment of the United States with divers per-

sons as might or could be induced to answer his advertisements, and to whom might be addressed the many circulars, reports and letters so sent and to be sent through the mails of the United States by the said C. E. Mitchell and the C. E. Mitchell Company by his direction; and that in and for executing the said scheme and artifice to defraud the said Mitchell did unlawfully deposit and cause to be deposited in the postoffice of the United States, in the City of Spokane, Spokane County, Washington, the three certain letters set forth in the three counts of the indictment."

This instruction is erroneous, ambiguous, confusing and misleading, and is not a correct or proper summary or synopsis of the charging part of the indictment, in this, to wit:

(a) The indictment charges that C. E. Mitchell had devised a scheme or artifice to defraud: intending in the execution and carrying out of said scheme or artifice to defraud to open and conduct correspondence by means of the postoffice establishment of the United States. The indictment then sets out the method of procedure resorted to by the said C. E. Mitchell in the executing and carrying out of the scheme and artifice to defraud (as found by them in the indictment to have been in existence), the various steps alleged to have been taken by the said C. E. Mitchell in the consummation and carrying out of said alleged scheme or artifice to defraud. On the other hand, the instructions instruct the jury that the charging part of the indictment relates to the de-

vising of the scheme [161] or artifice to defraud.

(b) The instruction is further confusing in that no distinction is made between the alleged false representations made by C. E. Mitchell and those alleged to have been made by the C. E. Mitchell Company. The indictment charges that certain alleged misrepresentations were made by the said C. E. Mitchell, while other alleged misrepresentations are alleged to have been made by the C. E. Mitchell Company, but in the instruction above given the Court has failed to differentiate between these alleged misrepresentations as alleged to have been made by C. E. Mitchell Company, and those alleged to have been made by C. E. Mitchell, and charges all of said alleged misrepresentations as being the misrepresentations of C. E. Mitchell.

(c) The instruction charges that: "Said Mitchell would cause to be incorporated the C. E. Mitchell Company, to be controlled and directed by him, for the alleged purpose of buying, selling and operating mines, quarries, mills, stores and conducting a general brokerage business in stocks; that said Mitchell would also secure the incorporation of the various other companies named in the indictment to conduct a general mining business; that he would represent and pretend that he had knowledge at first hand, of the actual, present and prospective value of the properties and assets of said various companies, their development and progress, and that the development of the properties of said various companies was under the control and direction of said C. E. Mitchell

and said C. E. Mitchell Company, * * *," and then charges "that the said C. E. Mitchell well knew that all the aforesaid representations as made by him and by and in the name of the C. E. Mitchell Company, under his direction, were misleading, false, untrue and fraudulent."

The indictment does not charge that the representations that Mitchell would cause to be incorporated the C. E. Mitchell [162] Company, to be controlled and directed by him for the alleged purpose of buying, selling and operating mines, quarries, stores, mills and conducting a general brokerage business in stocks" was a false representation. Nor does the indictment charge that the representation "that said Mitchell would also secure the incorporation of various other companies, named in the indictment, to conduct a mining business" was a false representation. On the contrary, the indictment specifically charges that these acts were done in executing and carrying out the scheme and artifice to defraud.

The same is true of the representation "that he would represent and pretend that he had knowledge at first hand of the actual, present and prospective value of the properties and assets of the said various companies, their development and progress" and "that the development of the properties of said various companies was under the control and direction of the said C. E. Mitchell and the C. E. Mitchell Company."

IV.

The following instruction was duly, regularly and timely excepted to and exception thereto duly allowed, to wit:

"Now, gentlemen of the jury, if you are satisfied from the evidence in this case beyond a reasonable doubt, that the defendant made one or more of the false *representation* charged in the indictment, in the sale of the mining stock therein described, and that false representations were so made in pursuance of a scheme or artifice to defraud, previously devised by the defendant, which was to be effected by correspondence or communication with another person by means of the postoffice establishment of the United States, and that in and for executing such scheme or artifice, the defendant deposited in the postoffice of the United States the several letters described in the different counts of the indictment, you will find the defendant guilty, as charged."

This instruction is misleading, ambiguous and does not [163] correctly state the law, in this, to wit:

(a) The jury is told that if the defendant made one or more of the false representations charged in the indictment in the sale of the mining stock therein described that they "will" find him guilty. This is especially objectionable when considered with the instructions immediately preceding this instruction. The last three instructions, taken together, are misleading, confusing, ambiguous and do not correctly state the law, either when considered separately or together.

V.

The following instruction was duly, regularly and timely excepted to and exception thereto duly allowed, to wit:

"Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows resort to circumstances as a means of ascertaining the truth. And in such cases great latitude is allowed by the law to the reception of indirect and circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but also supplying protection against imposition. When the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored for the reason that the force and effect of circumstantial facts usually and almost necessarily depends upon their connection with each other. Circumstances altogether inconclusive if separately considered may, by their number and joint operation, established or corroborated by minor coincidences, be sufficient to constitute conclusive proof."

This instruction is misleading, ambiguous and does not correctly state the law as applied to the facts in this case.

VI.

The following instruction was duly, regularly and timely [**164**] excepted to and exception thereto

duly allowed, to wit:

"The case of fraud, as here stated, is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge."

This instruction is misleading, erroneous and does not correctly state the law as applied to this case.

VII.

The following instruction was duly, regularly and timely excepted to and exception thereto duly allowed, to wit:

"Before you can find the defendant guilty, therefore, you must find that the offense was committed within the three years next preceding the return of the indictment. It is not necessary, however, that the Government should prove that the scheme or artifice to defraud was devised within three years. If you find that such a scheme or artifice was devised more than three years prior to the return of the indictment, but that the scheme or artifice was still in existence and the defendant was operating under it within the three years, the case is still without the statute of limitations and may be prosecuted. It was for this purpose that certain letters were received in evidence which were written more than three years prior to the return of the indictment, and they can only be considered for the purpose of enabling you to determine whether or not there was in fact a scheme or artifice to defraud."

This instruction was misleading, confusing and does not correctly state the law.

Defendant excepts to the ruling of the Court in admitting in evidence over the objection of counsel for the defense, the evidence herein specificially set out and excepts to the ruling of the Court with regard thereto, excepting generally and specifically to the introduction of each and every part of said testimony and the whole thereof and to each and every ruling of said Court with [165] reference thereto, and the whole and each and every part thereof.

VIII.

The Court erred in admitting in evidence over the objection of defendant's counsel the following questions propounded by counsel for the Government to the witness Scrafford, also the answers of said witness thereto:

Q. Mr. Scrafford, I call your attention to a statement of a circular signed by C. E. Mitchell Company, written about April 11th, 1907, reading as follows: "The Snowstorm pays its profits from ore that nets ten dollars. East Snowstorm is opening ore with every shot that averages fifty dollars in value." Is that a true statement of conditions as they obtained in the East Snowstorm?

A. As far as I know it is not.

Q. Was there any such ore as that extracted from that mine any time you were working there?

A. Not that I had ever sampled.

Q. "The East Snowstorm has ore in its tunnel now assaying as high as $105"?

A. That might be true.

Q. Well, would that be—would that statement be

true of the average, or just of the samples?

Mr. NUZUM.—That does not say samples, Mr. Cain. It says "assaying from as high"—it does not say what average.

The COURT.—It is for the jury to say what impression the party intended to convey by that letter. Overrule the objection.

Exception allowed.

IX.

The Court erred in admitting in evidence over the objection of counsel for the defense the following questions propounded by the counsel for the Government to the witness Schrader; also the answers of said witness thereto:

Q. Mr. Schrader, have you ever made any examination of the Coeur **[166]** d'Alene Eagle mining claim? A. Yes, sir.

Q. When did you make that examination?

A. It is about a year ago in April.

Q. State the extent of the examination you made.

A. I looked over nearly all the property—all of the most important part of it, with considerable detail around the main workings.

Mr. NUZUM.—Move to strike the answer where he says he looked over the most important part of it —that is inadmissible.

The COURT.—Overrule the objection. You can find out what he meant by that on cross-examination.

Exception.

X.

The Court erred in admitting in evidence over the

objection of defendant's counsel the following questions propounded by counsel for the Government to the witness Schrader, also the answers of the witness thereto:

Q. I now call your attention to the statement in Plaintiff's Exhibit #44: Speaking of some samples it says: "We sent these to the assayer and got the assays late last night; it yielded $71.66 copper, $16.48 silver, a total of $88.14 per ton. As the ore is all exactly alike in appearance it is not possible to make a selected sample and we believe this is a fair test of the value of the ore." State what the fact is as to the ore all being alike in appearance and not possible to make selected samples.

A. Well, I couldn't find any ore in the workings at all; the mineral which I did find was carefully picked, a little here and a little bit there, and it might assay pretty high in values, but there is nothing there in workable quantity that would approach anything like that, or nothing that I would consider workable ore.

Mr. NUZUM.—Move to strike the answer as not responsive at **[167]** all—not responsive to the question.

The COURT.—The first part of the answer is, I think, but the latter part I do not think is responsive. It will be stricken.

Q. Taking into account the manner in which the metal is distributed through the rock—I will ask you if in your opinion there is anything to indicate that the Coeur d'Alene Eagle would ever be a mine

from which ore could be extracted in paying quantities?

Mr. NUZUM.—Object—I don't think the examination that he has made of it would be sufficient for him to pass an opinion on.

The COURT.—Overrule the objection.

Exception allowed.

A. I do not think it is.

XI.

The Court erred in admitting in evidence over the objection of defendant's counsel the following questions propounded by counsel for the Government to witness Wagner; also the answers of said witness thereto:

Q. Do you know about the purchase of the Reliance mine? A. Yes, sir.

Q. Did you go to the mine with anyone before it was purchased? A. Yes, sir.

Q. With whom?

A. I went with Mr. Dunn, Professor Aughey and two other gentlemen.

Q. Did you have any talk with Mr. Mitchell about the purchase of it? A. Not at that time.

Q. Well, at any time before it was purchased?

A. Yes.

Q. Concerning the purpose for which you were purchasing and incorporating the company? **[168]**

A. Yes.

Q. What did Mr. Mitchell say with reference to the purpose?

Mr. NUZUM.—What time was this?

Q. Was this at or about the time of the purchase?

A. This was after the purchase of the property that I was talking to Mr. Mitchell about it, that is, about the Reliance, because I had never seen the ground until the day it was purchased.

The COURT.—What date was it?

A. Well, it was in the spring or about March, 1907, I think.

Q. What did he say?

Mr. NUZUM.—Object to any conversation at that time, if your Honor please—that is more than three years prior to the filing of this indictment.

The COURT.—I will dispose of that question when I come to charge the jury. I think they have a right to go into transactions prior to that time, although in the final disposition of the case the jury will have to be limited—I think the question is competent to give color to later transactions. Objection overruled.

Exception allowed.

Q. What did he say as to the purpose for which it had been bought?

A. He said he had bought it to get some more cheap stock.

XII.

The Court erred in admitting in evidence over the objection of counsel for the defendant the following questions propounded by counsel for the Government to the witness Wagner, also the answers of said witness thereto:

Q. Did you ever hear him make any statement

about selling mining stock by mail and still being able to control the mine? A. Yes.

Q. What statement did he make about that?

A. He said the stockholders never could get together that way, they were scattered so.

Mr. NUZUM.—I move to strike that as immaterial. That is **[169]** not within the issues. A man don't want to lose control of a mine. I couldn't anticipate what the answer would be—he says now he would rather sell it and have the stock scattered, because then the stockholders couldn't get together and take the control away from him—that is not within the charge of the indictment. Move to strike that as incompetent.

The COURT.—The motion will be denied.

Exception allowed.

[Objection to Overruling of Motion for New Trial, etc.]

Defendant objects to the overruling of his motion for a new trial, his amended motion and petition for a new trial and the affidavits in support thereof. At the close of the defendant's case counsel for the Government, in his opening to the jury, made substantially the following statement, to which no objection was made by counsel for the defendant: That it was admitted in the trial of this cause that the defendant before and after the organization of the C. E. Mitchell Company, and the various other companies mentioned in the indictment, intended to use the mails of the United States in the furtherance of the business of such companies, and that he did so

use the mails. Also that he mailed, or caused to be mailed, the three letters set forth in the indictment herein.

Defendant's counsel in his opening remarks made substantially the same statement. **[170]**

[Certificate of Hon. Frank H. Rudkin to Bill of Exceptions.]

This is to certify that the matters and proceedings embodied in the foregoing Bill of Exceptions, consisting of thirty-one pages, are matters and proceedings occurring in this cause not already a part of the record herein, and that the same are hereby made a part of such record. I further certify that the same contains all of the material matters, facts and proceedings heretofore occurring in this cause not already a part of the record therein.

Dated this 31st day of August, 1911.

FRANK H. RUDKIN,
Judge.

[Endorsements]: Bill of Exceptions. Filed in the U. S. District Court, Eastern District of Washington. September 1, 1911. W. H. Hare, Clerk. **[171]**

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

C. E. MITCHELL,
Plaintiff in Error and Defendant,
vs.
UNITED STATES OF AMERICA,
Defendant in Error and Plaintiff.

Praecipe for Transcript.

To W. H. Hare, Clerk of the Above-entitled Court:

You will please prepare a transcript and record in the above-entitled cause from a writ of error herein sued out, and file the same, under your certificate, with the Clerk of the Circuit Court of Appeals, within the life of this writ.

In this record you will please include, together with the endorsements thereon, the indictment; demurrer to the indictment; order overruling the demurrer to the indictment; motion for a Bill of Particulars made by the defendant, including affidavit thereto attached; minutes and entries showing arraignment and plea of the defendant; the verdict of the jury; notice of, and motion for, a new trial; amended motion and petition for new trial, and the affidavits in support thereof, including the original affidavits of John L. Dwyer and Wilbur L. Welch; the counter-affidavits filed by the plaintiff, including the original affidavits of Von K. Wagner and Stephen H. Morse, and exhibits thereto attached, and the affidavits of the defendant in reply to such counter-affidavits, including the original affidavits of J. R. Brown, W. E. Allen and E. C. Timberman, together with the exhibits thereto attached; order overruling motion for new trial; motion in arrest of judgment; the judgment; the bill of exceptions; assignment of errors; petition for writ of error; order allowing same; writ of error; the citation; copy of this

praecipe, and bond on appeal.

J. T. MULLIGAN,
F. D. ADAMS, **[172]**
JOHN C. KLEBER,
ALEX WINSTON,
Attorneys for Plaintiff in Error.

[Endorsements]: Praecipe for Transcript. Filed in the U. S. District Court, Eastern District of Washington, July 26, 1911. W. H. Hare, Clerk. **[173]**

In the District Court of the United States of America Eastern District of Washington, Eastern Division.

No. 871.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C. E. MITCHELL,
Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America to the Judge of the District Court of the United States for the Eastern District of Washington, Eastern Division, Greeting:

Because upon the trial in the records and proceedings, and because of different orders, rulings, and also in the rendition of the judgment and the sentence thereon of a cause which is in the said District Court, before you, or some of you, between the

United States of America, plaintiff, and C. E. Mitchell, defendant, a manifest error hath happened to the great damage of said defendant, C. E. Mitchell, as by his complaint appears, and it being fit that error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, **[174]** with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, County of San Francisco, in the State of California, within thirty days from the date of this writ in the said Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States this 24 day of July, 1911, and of the Independence of the United States, the one hundred and thirty-sixth.

W. H. HARE,

Clerk of the United States District Court, Eastern District of Washington, Eastern Division.

[175]

[Endorsed]: #871. In the District Court of the United States, Eastern District of Washington, Eastern Division. United States of America, Plff. vs. C. E. Mitchell, Deft. Writ of Error. J. T. Mulligan, F. D. Adams, J. C. Kleber, A. M. Winston, Attys. for Deft.

United States District Court Eastern District of Washington. ~~Filed Jul. 24, 1911. W. H. Hare, Clerk.~~

In the District Court of the United States of America Eastern District of Washington, Eastern Division.

No. 871.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

C. E. MITCHELL,
Defendant and Plaintiff in Error.

Citation.

United States of America,—ss.

To the United States of America, Plaintiff and Defendant in Error herein, and to Oscar Cain, United States Attorney:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, San Francisco County, State of California, within thirty days from the date of this writ, pursuant to a writ of error and appeal filed in the Clerk's Office of the District Court for the Dis-

trict of Washington, Eastern Division, wherein the United States is defendant in error and C. E. Mitchell plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 24th day of July, 1911.

FRANK H. RUDKIN,
District Judge Presiding in United States District Court, District of Washington, Eastern Division. **[176]**

Service of copy within citation admitted this 24th day of July, 1911.

OSCAR CAIN,
U. S. Dist. Atty.

[Endorsed]: #871. In the District Court of United States, Eastern District of Washington. C. E. Mitchell, Deft. and Plff. in Error, vs. United States of America, Plff. & Deft. in Error. Citation. United States District Court, Eastern District of Washington. Filed Jul. 26, 1911. W. H. Hare, Clerk.

[Certificate of Clerk.]

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the

United States for the Eastern District of Washington, do hereby certify that the foregoing pages numbered from one (1) to one hundred and seventy-eight (178) inclusive, constitute and are complete, true and correct copies of the indictment; demurrer to the indictment; motion for a Bill of Particulars made by the defendant, including affidavit thereto attached; minutes and entries showing arraignment and plea of the defendant; the verdict of the jury; notice of, and motion for, a new trial; amended motion and petition for new trial, and the affidavits in support thereof, including the original affidavits of John L. Dwyer and Wilbur L. Welch; the counter-affidavits filed by the plaintiff, including the original affidavits of Von K. Wagner and Stephen H. Morse, and exhibits thereto attached; and the affidavits of the defendant in reply to such counter-affidavits, including the original affidavits of J. R. Brown, W. E. Allen and E. C. Timberman, together with the exhibits thereto attached; order overruling motion for new trial; motion in arrest of judgment; the judgment; the bill of exceptions; assignment of errors; petition for writ of errors; order allowing same; original writ of error; original citation; praecipe; and bond on appeal, as the same remain on file and of record in said District Court, and that the same, which I transmit, constitute my return to the order of appeal lodged and filed in my office on the 24th day of July, A. D. 1911.

I farther certify that the cost of preparing and certifying said record amounts to the sum of One

Hundred Sixteen and Fifty One-hundredths ($116.-50) Dollars, and that the same has been paid in full by F. D. Adams, Esquire, of counsel for the appellant, C. E. Mitchell.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at the City of Spokane, **[177]** in said Eastern District of Washington, this 8th day of September, A. D. 1911, and the independence of the United States the one hundred and thirty-sixth.

[Seal] W. H. HARE,

Clerk, U. S. District Court, Eastern District of Washington. **[178]**

[Endorsed]: No. 2040. United States Circuit Court of Appeals for the Ninth Circuit. C. E. Mitchell, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Eastern District of Washington, Eastern Division.

Filed September 12, 1911.

F. D. MONCKTON,
Clerk.

In the Circuit Court of Appeals of the United States of America, Ninth Judicial Circuit.

No. 871.

UNITED STATES OF AMERICA,
Deft. in Error and Plaintiff,
vs.
C. E. MITCHELL,
Plff. in Error, Defendant.

Order [Extending Time to File Transcript].

By consent of the parties, it is hereby ordered that the defendant herein may have fifteen days from the 28th day of August, 1911, in order to prepare and file his transcript of the proceedings and record herein in the Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated at Spokane, Washington, this 4th day of August, 1911.

FRANK H. RUDKIN,
Judge District Court, Eastern Dist. of Washington, Eastern Division.

[Endorsed]: No. 2040. In the Circuit Court of Appeals of the Ninth Judicial Circuit of the United States of America. C. E. Mitchell, Plff. in Error & Deft., versus United States of America, Deft. in Error & Plff. Order Granting Extension of Time for Preparing and Filing Transcript. John T. Mulligan, Francis D. Adams, John C. Kleber, Alex. Winston, Attorneys for Plaintiff in Error & Defendant, 501 Peyton Building, Spokane, Washington. Filed Aug.

9, 1911. F. D. Monckton, Clerk. Refiled Sept. 12, 1911. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

C. E. MITCHELL,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Order Under Rule 16, Section 1, Enlarging Time Within Which to File Record Thereof and to Docket Case to September 12, 1911.

Upon application of Mr. Francis D. Adams, counsel for the plaintiff in error, and good cause therefor appearing, it is ORDERED that the time within which the original certified transcript of record in the above-entitled cause may be filed, and within which the plaintiff in error may docket the above-entitled cause with the clerk of this Court at San Francisco, California, be, and hereby is enlarged to and including the 12th day of September, A. D. 1911.

WM. W. MORROW,

United States Circuit Judge for the Ninth Judicial Circuit.

Dated San Francisco, California, August 22, 1911.

[Endorsed]: No. 2040. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16, Section 1, Enlarging Time within which to File Record thereof and to Docket Case to and Inclg. Sept. 12, 1911. Filed Aug. 22, 1911. F. D. Monckton, Clerk. Refiled Sep. 12, 1911. F. D. Monckton, Clerk.

NO. 2040

United States
Circuit Court of Appeals
For the Ninth Judicial Circuit

C. E. MITCHELL,
Plaintiff in Error,

vs.

THE UNITED STATES of AMERICA,
Defendant in Error

Upon Writ of Error to the United States District Court for the Eastern District of Washington, for the Eastern Division.

No. 2040

Brief of the Plaintiff in Error

JOHN T. MULLIGAN,
FRANCIS D. ADAMS,
Attorneys for Plaintiff in Error

DYER PRINTING CO., SPOKANE, WASHINGTON

NO. 2040

United States
Circuit Court of Appeals
For the Ninth Judicial Circuit

C. E. MITCHELL,
Plaintiff in Error,

vs.

THE UNITED STATES of AMERICA,
Defendant in Error

Upon Writ of Error to the United States District Court for the Eastern District of Washington, for the Eastern Division.

No. 2040

Brief of the Plaintiff in Error

JOHN T. MULLIGAN,
FRANCIS D. ADAMS,
Attorneys for Plaintiff in Error

DYER PRINTING CO., SPOKANE, WASHINGTON

STATEMENT OF THE CASE

The plaintiff in error, C. E. Mitchell, was indicted by the Federal Grand Jury for a misuse of the mails of the United States under section 5480, Rev. Stat. U. S. (as amended by the Act of March 2nd, 1889).

The indictment contained three counts, and was filed on the 9th day of April, 1910, on which day plaintiff in error was arraigned and entered a plea of "Not Guilty." (Pp. 1-19, Transcript of Record.)

A demurrer to the indictment was filed on the 7th day of April, 1911, and came on for hearing on said day, and was, after argument, overruled. (Pp. 20-22, Transcript of Record.)

A motion for a bill of particulars was filed on the 21st day of April, 1911, supported by the affidavit of C. E. Mitchell, setting forth that an order made by the Court previous thereto, directing the Government to permit defendant and his counsel to inspect certain documents, had not been complied with (Pp. 22-24, Transcript of Record), which motion for a bill of particulars was denied.

The case came on regularly to be heard, resulting in a verdict of "guilty" on all three counts charged in the indictment, which verdict was filed May 10th, 1911. (P. 24, Transcript of Record.)

On May 19th, 1911, motion for new trial was filed, and thereafter, and while said motion was still pending, the defendant was, on June 20th, 1911, sentenced to be imprisoned in the United States penitentiary at McNeil's Island, in the State of Washington, for a

period of one year at hard labor, and to pay the costs of the prosecution. (Pp. 27-28, Transcript of Record.)

On July 15th, 1911, and while the motion for new trial was still pending, and at the same term at which the defendant was convicted, defendant filed under court rule No. 74 (District Court Rules) a petition and amended motion for a new trial, which motion was supported by a number of affidavits (Pp. 30-68, Transcript of Record). This motion came on regularly for hearing on the 24th day of July, 1911, on which day, and at the hearing upon said petition, the affidavits of the government, (Pp. 75-103, Transcript of Record), were served. The petition for new trial was denied and the motion overruled, to which ruling defendant excepted, and exception was allowed, and defendant granted time within which to file such other and further answering affidavits as he desired, which affidavits were thereafter filed on the 3rd day of August, 1911 (Pp. 104-129, Transcript of Record).

Motion in arrest of judgment was filed on the 24th day of July, 1911, and same was denied (P. 28, Transcript of Record).

Petition for writ of error by defendant (plaintiff in error), was filed upon the 24th day of July, 1911, and same was, upon said day, allowed, and bond thereon filed on said day, and upon the same day defendant, (plaintiff in error), filed his assignment of errors, numbering eighteen, (18), in all. (Pp. 129-155, Transcript of Record.)

Thereafter, and on the 31st day of August, 1911,

defendant, (plaintiff in error), filed his bill of exceptions, duly certified by the Honorable Frank H. Rudkin, Judge of the District Court in and for the Eastern District of Washington, Eastern Division. (Pp. 155-193, Transcript of Record.)

Thereafter an order was made extending the time allowing defendant, (plaintiff in error), to file transcript of the proceedings and record in this cause to and including the 12th day of September, 1911. (Pp. 201-202, Transcript of Record.)

Plaintiff in error comes here upon writ of error.

ASSIGNMENTS OF ERROR.

The errors asserted by plaintiff in error, and which he intends to urge are as follows, (Pp. 136-154, Transcript of Record):

I.

The Court erred in overruling the demurrer of the defendant to the indictment herein, for the reason that said indictment failed to set forth facts sufficient to constitute a crime under section 5480 of the Revised Statutes of the United States of America, (as amended by the Act of March 2nd, 1899). (25 Stat., P. 873.) (Pp. 20-22, Transcript of Record.)

II.

The Court erred in denying defendant's motion for a bill of particulars, and for an inspection of the papers on which the Government relied for its conviction, which prevented the defendant from being able to properly prepare for trial (Pp. 22-24, Transcript of Record).

IV.

The Court erred in admitting in evidence over the

objection of the defendant's counsel the following questions propounded by counsel for the Government to the witness Schrader; also the answers of said witness thereto (P. 139, Transcript of Record).

Q. Mr. Schrader, have you ever made any examination of the Coeur d'Alene Eagle mining claim?

A. Yes, sir.

Q. When did you make that examination?

A. It is about a year ago in April.

Q. State the extent of the examination you made.

A. I looked over nearly all of the property—all of the most important part of it, and with considerable detail around the main workings.

Mr. NUZUM: Move to strike the answer where he says he looked over the most important part of it —that is inadmissable.

The COURT: Overrule the objection. You can find out what he meant by that on cross-examination.

Exception.

V.

The Court erred in admitting in evidence over the objection of defendant's counsel, the following questions propounded by counsel for the Government to the witness Schrader; also the answers of the witness thereto (P. 139-140, Transcript of Record):

Q. I now call your attention to a statement in Plaintiff's Exhibit No. 44. Speaking of some samples, it says: "We sent these to the assayer and got the assays late last night; it yielded $71.66 copper and $16.48 silver, a total value of $88.14 per ton. As the ore is all exactly alike in appearance it is not possible

to make a selected sample, and we believe this is a fair test of the value of the ore." State what the fact is as to the ore all being alike in appearance and not possible to make a selected sample.

A. Well, I couldn't find any ore in the workings at all; the mineral which I did find was carefully picked, a little bit here and a little bit there, and it might assay pretty high in values, but there is nothing there in a workable quantity that would approach anything like that, or nothing that I would consider workable ore.

Mr. NUZUM: Move to strike the answer as not responsive at all—not responsive to the question.

The COURT: The first part of the answer is, I think, but the latter part I do not think is responsive. It will be stricken.

Q. Taking into account the manner in which the metal is distributed through the rock—I will ask you if in your opinion there is anything to indicate that the Coeur d'Alene Eagle would ever be a mine from which ore could be extracted in paying quantities?

Mr. NUZUM: Object—I don't think the examination that he has made of it would be sufficient for him to pass an opinion on.

The COURT: Overrule the objection.

Exception allowed.

A. I do not think it is.

VI.

The Court erred in admitting in evidence over the objection of defendant's counsel, the following questions propounded by counsel for the Government to

the witness Wagner; also the answers of said witness thereto (P. 141-2, Transcript of Record).

Q. Do you know about the purchase of the Reliance mine?

A. Yes, sir.

Q. Did you go to the mine with anyone before it was purchased?

A. Yes, sir.

Q. With whom?

A. I went with Mr. Dunn, Professor Aughey and two other gentlemen.

Q. Did you have any talk with Mr. Mitchell about the purchase of it?

A. Not at that time.

Q. Well, at any time before it was purchased?

A. Yes.

Q. Concerning the purpose for which you were purchasing and incorporating the company?

A. Yes.

Q. What did Mr. Mitchell say with reference to the purpose?

Mr. NUZUM: What time was this?

Q. Was this at or about the time of the purchase?

A. This was after the purchase of the property that I was talking to Mr. Mitchell about it, that is, about the Reliance, because I had never seen the ground until the day it was purchased.

The COURT: What date was it?

A. Well, it was in the spring or about March, 1907, I think.

Q. What did he say?

Mr. NUZUM: Object to any conversation at that time, if your Honor please—that is more than three years prior to the filing of this indictment.

The COURT: I will dispose of that question when I come to charge the jury. I think they have a right to go into transactions prior to that time, although in the final disposition of the case the jury will have to be limited. I think the question is competent to give color to later transactions. Objection overruled.

Exception allowed.

Q. What did he say as to the purpose for which it had been bought?

A. He said that he had bought it to get some more cheap stock.

VIII.

The Court erred in admitting in evidence all of the letters, circulars, reports and documents prepared and sent out more than three years prior to the return of the indictment and filing thereof (P. 143, Transcript of Record).

X.

The Court erred in admitting in evidence those certain letters referring to the Columbia River Marble Company, in this, to-wit (P. 143, Transcript of Record):

(a) That said letter was written, mailed and received more than three years prior to the return or filing of the indictment;

(b) That there is no evidence establishing, or tending to establish, any connection, either direct or indirect, of this letter with the alleged fraudulent

scheme or artifice to defraud set out in the indictment, or in the alleged fraudulent acts executed in the carrying out of said alleged scheme or artifice to defraud.

XI.

The Court erred in admitting in evidence that certain letter dated in 1904, and addressed to one George D. Needy, in this, to-wit (P. 144, Transcript of Record):

(a) That said letter was written, mailed and received more than three years prior to the return or filing of the indictment;

(b) That said letter was written, mailed and received outside of the State of Washington, and beyond the jurisdiction of this Court;

(c) That there is no evidence establishing, or tending to establish, any connection, either directly or indirectly, of this letter with the alleged fraudulent scheme or artifice to defraud set out in the indictment, or in the alleged fraudulent acts executed in the carrying out of said alleged scheme or artifice to defraud.

XII.

Referring particularly to the instructions of the Court, the Court erred in giving the following instruction, to-wit (Pp. 144-145, Transcript of Record):

"Under this section three matters of fact must be charged in the indictment, and established by the evidence at the trial. First: That the defendant devised a scheme or artifice to defraud; second: that

such scheme or artifice to defraud was to be effected by correspondence or communication with another person by means of the postoffice establishment of the United States, and, third, that in carrying out such scheme or artifice to defraud the defendant deposited, or caused to be deposited, a letter in the postoffice of the United States. These three elements are set forth in the indictment in this case, and the question for your determination is, are they established by the evidence? I do not understand that there is any substantial controversy as to the second and third elements of the crime here charged. It appears from the testimony without apparent contradiction that the postoffice establishment of the United States was used extensively by the defendant for the purpose of promoting the business in which he was engaged, and there seems to be no question that he at all times intended to so use it. It is likewise conceded that the defendant deposited in the postoffice of the United States the three letters specifically set forth in the three counts of the indictment."

XIII.

The Court erred in giving the following instruction, to-wit (P. 146, Transcript of Record):

"I will now revert to the first and most important element of the offence charged, namely, the devising of a scheme or artifice to defraud."

XIV.

The Court erred in giving the following instruction, to-wit (Pp. 147-149, Transcript of Record):

"For the purpose of these instructions, I deem it sufficient to say that the scheme or artifice to defraud, devised by the defendant Mitchell as charged by the indictment, is substantially as follows:

"That the said Mitchell would cause to be incorporated the C. E. Mitchell Company, to be controlled and directed by him, for the alleged purpose of buying, selling and operating mines, quarries, mills, stores and conducting a general brokerage business in stocks; that said Mitchell would also secure the incorporation of the various other companies named in the indictment to conduct a mining business; that he would procure from such companies stocks which he would sell and dispose of by means of false and fraudulent representations, as set forth in the indictment; that he would represent and pretend that he had knowledge at first hand, of the actual present and prospective values of the properties and assets of said various companies, their development and progress, and that the development of the properties of said various companies was under the control and direction of the said C. E. Mitchell and said C. E. Mitchell Company; that the stocks of the said various companies was of great value and would become of still greater value; that the properties owned by said various companies were of great value and would become of still greater value; that said companies had ore that could be shipped in paying quantities; that the stock of said companies was being offered for sale to secure funds to develop and equip the said properties; that the proceeds from the sale of all stock of

said companies were to be used to develop and equip said properties; that the stock of said respective companies would greatly enhance in value, and that said companies would pay dividends; that the said C. E. Mitchell well knew that all the aforesaid representations so made by him, and by and under his direction were misleading, false, untrue and fraudulent; that the stock of said various companies was not of the value so represented, and would not increase in value and become of greater value; that the properties of the said various corporations were not of the value so represented, and would not become of greater value; that said companies did not have ore capable of being shipped in paying quantities, and that the corporations would not pay dividends; that the proceeds from the sale of the stock of said companies would not be used to develop the properties of said companies, but the same would be, and it was intended by the said C. E. Mitchell that a large part of the proceeds from the sale of the stock of said various companies would be by him fraudulently converted to his own use, and that it was the intent of the said C. E. Mitchell to fraudulently convert the moneys so obtained, or a large portion thereof, to his own use: which said scheme and artifice to defraud, devised by said Mitchell, was to be effected by opening correspondence and communication by means of the postoffice establishment of the United States with divers persons as might or could be induced to answer his advertisements, and to whom might be addressed the many circulars, reports and letters so sent and to be sent through the mails of the United States by the

said C. E. Mitchell and the C. E. Mitchell Company by his direction; and that in and for executing the said scheme and artifice to defraud the said Mitchell did unlawfully deposit and cause to be deposited in the postoffice of the United States, in the City of Spokane, Spokane County, Washington, the three letters set forth in the three counts of the indictment."

XV.

The Court erred in giving the following instruction, to-wit (Pp. 151-152, Transcript of Record):

"Now, gentlemen of the jury, if you are satisfied from the testimony in this case, beyond a reasonable doubt, that the defendant made one or more of the false representations charged in the indictment, in the sale of the mining stocks therein described, and that such false representations were so made in pursuance of a scheme or artifice to defraud previously devised by the defendant, which was to be effected by correspondence or communication with another person by means of the postoffice establishment of the United States and that in and for executing such scheme or artifice, the defendant deposited in the postoffice of the United States the several letters described in the different counts of the indictment, you will find the defendant guilty as charged."

XVI.

The Court erred in giving the following instruction, to-wit (Pp. 152-153, Transcript of Record):

"Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that

reason, among others, the law allows resort to circumstances as a means of ascertaining the truth. And in such cases great latitude is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but also supplying protection against imposition. When the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored for the reason that the force and effect of circumstantial facts usually and almost necessarily depends upon their connection with each other. Circumstances altogether inconclusive if separately considered may, by their number and joint operation, established or corroborated by minor coincidences, be sufficient to constitute conclusive proof."

XVII.

The Court erred in giving the following instruction, to-wit (P. 153, Transcript of Record):

"The case of fraud, as here stated, is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge."

XVIII.

The Court erred in giving the following instruction, to-wit (Pp. 153-154, Transcript of Record):

"Before you find the defendant guilty, therefore, you must find that the offense was committed within the three years next preceding the return of the in-

dictment. It is not necessary, however, that the Government should prove that the scheme or artifice to defraud was devised within three years. If you find that such a scheme or artifice was devised more than three years prior to the return of the indictment, but that the scheme or artifice was still in existence and the defendant was operating under it within the three years, the case is still without the statute of limitations and may be prosecuted. It was for this purpose that certain letters were received in evidence which were written more than three years prior to the return of the indictment, and they can only be considered for the purpose of enabling you to determine whether or not there was in fact a scheme or artifice to defraud."

The Court further erred in denying defendant's motion for a new trial on account of said errors, and for the further reasons as set forth in the defendant's amended motion and petition for a new trial, and the affidavits in support thereof (P. 154, Transcript of Record).

The Court had no jurisdiction to render the judgment rendered, and the judgment and sentence is void (P. 154, Transcript of Record).

ARGUMENT AND AUTHORITIES.

Believing it will be in more logical order and that it will assist both Court and counsel we will not attempt to discuss the various assignments in their numerical order.

THE JUDGMENT AND SENTENCE ARE VOID.

The last Assignment of Error (numbered 18, P. 154, Transcript of Record), reads as follows:

"The Court had no jurisdiction to render the judgment rendered, and the judgment and sentence is void."

The defendant was convicted under Sec. 5480, Rev. Stat. of the United States (as amended by the Act of March 2nd, 1899).

Referring particularly to the punishment this statute provides:

"Such person, so misusing the postoffice establishment, shall, upon conviction, be punishable by a fine of not more than five hundred dollars, or by imprisonment for not more than eighteen months, or by both such punishments at the discretion of the court."

The sentence imposed by the Court was as follows (Pp. 27-28, Transcript of Record):

"Whereupon, it is ordered by the Court that the said defendant, C. E. Mitchell, be imprisoned in the United States Penitentiary at McNeil's Island, State of Washington, for the period of one (1) year at hard labor, and to pay the cost of the prosecution, and to stand committed to the custody of the Marshal of the United States for the Eastern District of Washington, to carry this sentence into execution."

It will be readily noted that the sentence imposed by the statute is a sentence simply of imprisonment, the element of "hard labor" being lacking, nor does

it require that the accused shall be confined to the penitentiary.

The words "hard labor" do not appear in this statute, and defendant was sentenced for one year, and *not more,* therefore, in the language of the Supreme Court of the United States (In Re Mills, 135 U. S. 263, 34 L. Ed. 107):

"A sentence simply of imprisonment in the case of a person convicted of an offense against the United States—where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary—cannot be executed by confinement in that institution, except in cases where the sentence is 'for a period *longer* than one year.' There is consequently no escape from the conclusion that the judgment of the court sentencing the petitioner to imprisonment in a penitentiary, in one case for a year and in the other for six months, was in violation of the statutes of the United States. The Court below was without jurisdiction to pass any such sentence, and the orders directing the sentence of imprisonment to be executed in a penitentiary are void."

The Court added:

"This is not a case of mere error, but one in which the court below transcended its powers."

Citing:

Ex parte Lange, 18 Wall 163, 176;
Ex parte Parks, 93 U. S. 18, 23;
Ex parte Virginia, 100 U. S. 339, 343;
Ex parte Rowland, 104 U. S. 604, 612;

In re Coy, 127 U. S. 731, 738;

Hans Neilson, Petitioner, 131 U. S. 176, 182.

This case has never been modified by the Supreme Court of the United States. On the contrary, was expressly re-affirmed in In Re Bonner, 151 U. S. 242, 38 L. Ed., 149, in this language:

"It follows that the court had no jurisdiction to order an imprisonment, when the place is not specified in the law, to be executed in a penitentiary when the imprisonment is not ordered for a period longer than one year or at hard labor. The statute is equivalent to a direct denial of any authority on the part of the court to direct that imprisonment be executed in a penitentiary in any cases other than those specified. Whatever discretion, therefore, the court may possess, in prescribing the extent of imprisonment as a punishment for the offense committed, it cannot, in specifying the place of imprisonment, name one of these institutions."

Indeed the general rule is that the word "imprisonment," in its ordinary sense, contemplates and means "within the common jail," rather than in the penitentiary.

Ex parte Cain, 20 Okla. 125, 93 Pac. 974;

Cheney vs. State, 36 Ark. 75;

Horner vs. State, 1 Ore. 268;

Brooks vs. People, 14 Colo, 413, 24 Pac. 553;

State vs. McNeill, 75 N. C. 15;

Hockheimer on Crimes & Crim. Procedure, Secs. 112-345.

We take it that it is needless to suggest that where

the statute does not provide for punishment *"at hard labor"* that that part of the sentence is absolutely void.

Haynes vs. U. S., 101 Fed. 817 (C. C. A.);
Gardes vs. U. S., 87 Fed. 172 (C. C. A.);
Harmon vs. U. S., 50 Fed. 921;
In re Christian, 82 Fed. 199;
In re Bonner, supra.

We, therefore, submit that under the rule announced in In Re Bonner, *supra,* and in In Re Mills, *supra,* the sentence and the order directing the sentence of imprisonment are void.

While the Mills and Bonner cases are absolutely conclusive of the question affecting the validity of the order and sentence, we suggest that under no circumstances can the defendant be lawfully sentenced to the United States penitentiary at McNeil's Island for two reasons:

(1) The pentitentiary at McNeil's Island was erected "for the confinement of all persons convicted of any crime whose term of imprisonment is one year or more *at hard labor* by any Court of the United States, etc." (26 Stat. L. 839);

(2) The penitentiary at McNeil's Island is outside of the district wherein the defendant was convicted.

The second reason above suggested is found in Sec. 5540, Rev. Stat. U. S., which provides that where a judicial district has been divided (as was done in Washington), the district courts of the United States have power to sentence anyone convicted of an of-

fense punishable by imprisonment *at hard labor* to the penitentiary within the State, although it be outside of the judicial district in which the conviction is had.

The defendant could not, under any circumstances, be sentenced at *hard labor,* because, as we have already stated, the statute is silent as to the element of hard labor.

If, as suggested by the Bonner case, the statute therein discussed "is equivalent to a direct denial of any authority on the part of the Court to direct that imprisonment be executed in a penitentiary in any cases other than those specified" does it not necessarily follow that he could not be confined in a penitentiary where the statute creating such penitentiary expressly designates such penitentiary as a place of confinement of persons convicted whose term of imprisonment includes the element "at hard labor?"

ASSIGNMENT OF ERROR NUMBERED XII IN THE ASSIGNMENT OF ERRORS.

The instruction assigned as error under this assignment, reads as follows:

"Under this section three matters of fact must be charged in the indictment and established by the evidence at the trial: First: That the defendant devised a scheme or artifice to defraud; Second: That such scheme or artifice to defraud was to be effected by correspondence or communication with another person by means of the postoffice establishment of the United States, and, Third: That in carrying out such

scheme or artifice to defraud the defendant deposited or caused to be deposited a letter in the postoffice of the United States. These three elements are set forth in the indictment in this case, and the question for your determination is, are they established by the evidence? I do not understand that there is any substantial controversy as to the second and third elements of the crime here charged. It appears from the testimony, without apparent contradiction, that the postoffice establishment of the United States was used extensively by the defendant for the purpose of promoting the business in which he was engaged, and there seems to be no question that he at all times intended to so use it."

We recognize the rule that in a criminal case in the Federal Courts an expression of opinion on the facts by the court is permissible.

Ellis vs. United States, 155 U. S. 117, 39 L. Ed. 91;

Starr vs. United States, 153 U. S. 614, 38 L. Ed. 841;

Weiss vs. Bethlehem Iron Co., 88 Fed. 37;

Sparf vs. United States, 156 U. S. 51, 39 L. Ed. 342.

This, however, does not permit the trial judge withdrawing from the consideration of the jury the very gist of the offence charged. We shall first contend in the language of Mr. Justice Best (King vs. Burdette, 3 Barn. and Ald. 717, 4 Barn and Ald. 95):

"If there was any evidence, it was my duty to leave it to the jury, who alone could judge of its weight.

The rule that governs a judge as to evidence applies equally to the case offered on the part of the defendant, and that in support of the prosecution. It will hardly be contended, that if there was evidence offered on the part of the defendant, a judge would have the right to take on himself to decide on the effect of the evidence, and to withdraw it from the jury. Were a judge so to act, he might, with great justice, be charged with usurping the privileges of the jury, and making a criminal trial, not what it is by our law, a trial by jury, but a trial by the judge."

We next contend that the instruction complained of, as above quoted, goes further, and practically instructs a verdict of guilty by taking from the consideration of the jury the second and third elements of the offence charged and inferentially assuming the existence of the first element. All of the authorities agree that three elements are essential to constitute the crime charged:

First: The accused devised some scheme or artifice to defraud.

Second: That he intended to consummate it by opening, or intending to open correspondence or communication with some other person or persons, through the postoffice establishment or by inciting such other person to open communication with him.

Third: That in and for executing such scheme, or in attempting so to do, he either placed, or caused to be placed, in the post office, intended to be carried and delivered by the United States mail service, a

letter, circular or advertisement, or received one from another through the mail.

Miller vs. U. S., 174 Fed. 35 (C. C. A.);
Horn vs. U. S., 182 Fed. 721 (C. C. A.);
Ewing vs. U. S., 136 Fed. 53 (C. C. A.);
Rudd vs. U. S., 173 Fed. 912 (C. C. A.);
Hibbard vs. U. S., 172 Fed. 66 (C. C. A.);
Etheredge vs. U. S., 186 Fed. 434 (C. C. A.);
Rimmerman vs. U. S., 186 Fed. 307 (C. C. A.);
Post vs. U. S., 135 Fed. 1 (C. C. A.);
Blackman vs. U. S., 186 Fed. 965 (C. C. A.);
Stokes vs. U. S., 157 U. S. 187, 39 L. Ed. 667;
Miller vs. U. S., 133 Fed. 337 (C. C. A.);
Foster vs. U. S., 178 Fed. 165 (C. C. A.);
Blackman vs. U. S., 186 Fed. 965 (C. C. A.);
Lemon vs. U. S., 164 Fed. 953 (C. C. A.);

All of the authorities agree absolutely that while the formation of some scheme or artifice to defraud is an essential element of the offence, the *gist of the offense is the use,* or attempted use, *of the United States mails* for the forbidden purpose.

Horn vs. U. S., 182 Fed. 721 (C. C. A.);
Leman vs. U. S., 164 Fed. 852 (C. C. A.);
U. S. vs. Clark, 125 Fed. 92 (C. C. A.);
O'Hara vs. U. S., 129 Fed. 551 (C. C. A.);
Post vs. U. S., 113 Fed. 852 (C. C. A.);
Rudd vs. U. S., 173 Fed. 912 (C. C. A.);
Post vs. U. S., 135 Fed. 1 (C. C. A.);
McKnight vs. U. S., 115 Fed. 972 (C. C. A.);
U. S. vs. Ryan, 123 Fed. 634 (C. C. A.).

In Lemon vs. U. S., *supra,* the Circuit Court of Appeals (8th Circuit) says:

"The mailing of a letter in the execution or attempted execution of a fraudulent scheme is the gist of th offense denounced by the statute. *It is that act, and it alone, which confers jurisdiction upon the courts of the United States to punish devisers of fraudulent schemes.*"

In the U. S. vs. Clark, *supra,* the court said:

"It is the use of the mails as a means of accomplishing the fraud, that is the gravamen of the charge, and we cannot supply it by intendment."

In Horn vs. U. S., *supra,* the court says:

"While the formation of some scheme or artifice to defraud is an essential element of the offense, *the gist of the offense is the use or attempted use of the United States mails for the forbidden purpose.*"

Indeed the statute itself under which this conviction was had provides, that: "Such person, *so misusing the post-office establishment,* shall, upon conviction, be punishable," etc.

It will thus be noted that the gist of the offence, all of the authorities agree, is found either in the second or third elements. The intent to effect a scheme is found in the second element and the carrying out of the scheme is found in the third.

The question whether or not there was an intent to defraud is a matter to be determined by the jury.

Hibbard vs. U. S., 172 Fed. 66 (C. C. A.);

U. S. vs. Conrad, 166 Fed. 248;

U. S. vs. Reid, 42 Fed. 134;

U. S. vs. Post, 113 Fed. 852 (C. C. A.);
U. S. vs. White, 150 Fed. 379;
Ruad vs. U. S., 173 Fed. 912 (C. C. A.);
Post vs. U. S., 135 Fed. 1 (C. C. A.).

In the Hibbard case, the Circuit Court of the 7th Circuit, says:

"The accused, however, is entitled to the benefit of the presumption of innocence and good faith, created by law in his favor, and to have the jury instructed accordingly, in terms which involve no doubt of their meaning, *so that the question of intent is thus presented as an issue of fact alone,* upon which the accused must be acquitted, unless both presumption of good faith and evidence introduced in his favor are overborne by direct and such circumstantial proof, establishing beyond reasonable doubt his intent to defraud the patrons by the efforts and means employed in the use of the mails."

In th Post case, 135 Fed. 1, the Circuit Court of the 5th Circuit, says:

"In a criminal trial, where the defendant's only plea is, 'Not Guilty,' the general rule is unquestioned that the burden of proof, and the obligation to convince the jury of the prisoner's guilt beyond a reasonable doubt, as to all essential matters, including the criminal intent, is upon the prosecution throughout the trial, and there is no shifting of the burden of proof during the trial."

In U. S. vs. Post, 113 Fed. 852, the Court says:

"In this case the dishonest and fraudulent intentions of the defendant would be the question to be

passed upon by the jury, and it should be clearly charged and stated."

So too the law is settled beyond question, that the burden of proving each element of the offence beyond a reasonable doubt rests throughout on the prosecution. The rule of law contended for by us is stated in Post vs. U. S., 135 Fed. 1, in this language:

"In Federal jurisprudence there is no question as to the proper rule. In Davis vs. United States, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499, it was held that the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, *and applies to every element necessary to constitute the crime.*"

See also

Underhill on Criminal Evidence, Section 157.

2 Bishop New Criminal Procedure, Section 699.

Our last suggestion in laying the foundation for the argument that is to follow is, that something should have been said in this instruction in regard to the jury finding the facts beyond a *reasonable doubt.* We do not believe that it is necessary to cite cases to support the principle that courts must instruct the jury to find the facts beyond a *reasonable doubt.* We do not believe that counsel for the Government can cite a single case from the whole catalogue of adjudicated cases where an appellate court

has permitted an instruction of a trial court to stand where the trial court has omitted from his instructions the element of *reasonable doubt.* Indeed we could with safety (though it be not necessary in this case), assert the rule to be that the jury must find the facts beyond a *reasonable doubt* on each and all of the elements charged.

We are satisfied that up to this point there can be no controversy as to the law. Indeed, we have been reciting or summing up what we consider "Horn book" law. However, these most familiar principles furnish the foundation upon which is built the civil rights of the defendant, and if we are correct in our conclusions, we earnestly insist that there can be no escape from a reversal in this case. Under this law and these principles it was the duty of the learned trial court to submit for the consideration of the jury three questions:

(1) Did the defendant devise a scheme or artifice to defraud?

(2) Did he intend to consummate it by opening or intending to open correspondence or communication with any person or persons through the post-office establishment, or by inciting such other person or persons to open communication with him, and—

(3) Did he deposit the letters referred to in the indictment in the execution of the scheme or artifice previously found by the jury to have been devised by the defendant for the purpose aforesaid.

After submitting these three questions in reasonably plain and unambiguous language it was the duty

of the trial court to instruct the jury that they must find the facts *beyond a reasonable doubt.*

It will be remembered that the defendant admitted that he mailed the letters set forth in the indictment. (P. 192, Transcript of Record.) It also will be remembered, as the record will show, that the defendant's plea was "not guilty," which put in issue every material allegation of the indictment. The evidence of the defendant himself, and all the witnesses for the defense (to say nothing of the presumption of law), certainly kept all of these allegations in issue throughout the case, excepting as to the mailing of the letters set out in the indictment, which counsel for the Government admitted were mailed, not in the execution of a scheme or fraud, but in the furtherance of the business of the corporations mentioned in the indictment. (P. 192, Transcript of Record.) The exact admission being, "At close of the defendant's case, counsel for the Government, in his opening to the jury, made substantially the following statement, to which no objection was made by counsel for the defendant; that it was admitted in the trial of this cause that the defendant before and after the organization of the C. E. Mitchell Company, and the various other companies mentioned in the indictment, intended to use the mails of the United States *in the furtherance of the business of such companies*, and that he did so use the mails."

Therefore, we repeat that, when the Court charged the jury that there was no substantial controversy as to the second and third elements of the offence

charged he took from the consideration of the jury the second and third elements of the offence and attempted to submit the case to the jury upon the theory that there was but one question to be determined and that was,—did the defendant devise a scheme or artifice to defraud? Even upon this element, which the learned trial Court evidently attempted to submit to the jury, the defendant was not given the benefit of "a reasonable doubt" instruction in this instruction.

We earnestly submit that we have placed this instruction in the most favorable light, from the standpoint of the Government, that it is possible to place it. While this instruction would be sufficient under all the authorities to entitle the defendant to a reversal of this case, we go further, and say, that the language used by the court is even more sweeping and far reaching than we have heretofore suggested. This instruction taken as a whole, analyzed in the light of reasonable construction, takes from the consideration of the jury, absolutely, all three elements of the offence charged. It is equivalent to directing the jury to return a verdict of guilty. The three elements of the offence charged, first, the devising of the scheme, second, the intent to effect the scheme, and third, the carrying out of the scheme, are all interdependent; each is a necessary and indivisible part of all. Without the conception or devising of a scheme there could be no attempt to effect the scheme; if there be an intent to effect the scheme there must be in existence at that time a scheme to be effected. Without

the devising of a scheme there could be no carrying out of a scheme. The first is the devising or conception of the scheme and the second is the intent to effect the scheme, namely, an intention to put the scheme into operation by opening or intending to open correspondence, etc., and the third, is the consummation of the act, constituting the three elements of the offence, and these three elements taken together constitute the crime.

The only possible construction to be placed upon the language of the Court is that it *assumes* the existence of a scheme or artifice to defraud, and further assumes that this scheme or artifice to defraud was devised by the defendant, and that it was to be effected by correspondence and communication with another person by means of the postoffice establishment of the United States. The first and second elements under this construction are so interwoven that an admission of the second element of the offence charged is an admission of the existence of the first element. Also the first and third elements under this instruction are so interwoven that an admission of the existence of the third element is an admission of the existence of the first. How is it possible for a scheme or artifice that is not in existence to be effected by correspondence or communication, or otherwise? How would it be possible to carry out such scheme or artifice if there was none in existence? How is it possible for a learned trial court to say that there is no substantial controversy as to the second and third elements of the offence charged

without *assuming* the existence of the first element? This is further emphasized in the court's instructions in this language (P. 179, Transcript of Record): "I deem it sufficient to say that the scheme or artifice to defraud, *devised by the defendant Mitchell,* as charged in the indictment, is substantially as follows," and again (P. 180, Transcript of Record), "which said scheme and artifice to defraud *devised by said Mitchell,* was to be effected by opening correspondence," etc., using the word "devised" in the past tense, indicating the assumed existence of the scheme or artifice.

It can serve no good purpose to discuss with any degree of thoroughness the general law governing the trial judge in instructions in criminal cases. The rule is so well stated in Starr vs. United States, 153 U. S. at page 625, 38 L. Ed. 845, that we quote the following and adopt it as the unchallenged law:

"We are compelled to add some further observation in relation to the charge before us.

"It is true that in the Federal Courts the rule that obtains is similar to that in the English Courts, and the presiding judge may, if in his discretion he think proper, sum up the facts to the jury; and if no rule of law is incorrectly stated, and the matters of fact are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the fact is not reviewable on error. (Rucker vs. Wheeler, 127 U. S. 85, 93 (32:102, 105); Lovejoy vs. United States, 128 U. S. 171, 173 (32:389, 390). But he should take care to separate the law from

the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. (M'Lanahan vs. Universal Ins. Co., 28 U. S., 1 Pet. 1.0. 182 (7:98, 104). As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction is not given as to a point of law by which they are to be governed, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to."

And again, "the prisoner had the right to the judgment of the jury upon the facts, *uninfluenced* by any direction from the court as to the weight of the evidence."

Hopt vs. Utah, 110 U. S. 574, 28 L. Ed. 262.

See generally, sustaining this rule:

Starr vs. U. S., 153 U. S. 614, 38 L. Ed. 841;

Allis vs. U. S., 155 U. S. 614, 39 L. Ed. 91;

Second Nat'l Bank vs. Hunt, 78 U. S. 391, 20 L Ed. 190;

Vicksburg & M. R. Co. vs. O'Brien, 119 U. S. 99, 30 L. Ed. 299;

Knickerbocker L. Ins. Co. vs. Foley, 105 U. S. 350, 26 L. Ed. 1055;

Hibbard vs. U. S., 172 Fed. 66, 18 Am. & Eng. Ann. Cas. 1041;

Weiss vs. Bethlehem Iron Co., 88 Fed. 37 (C. C. A.);

Mills vs. U. S., 164 U. S. 644, 41 L. Ed. 584;

Hicks vs. U. S., 150 U. S. 442, 37 L. Ed. 1137;
People vs. Garbutt, 17 Mich. 9.

The reason for the limitations, so well recognized in the authorities, is well and aptly stated by Mr. Justice Fuller in Starr vs. U. S., *supra,* in this language:

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and his lightest word, or intimation, is received with deference, and may prove controlling."

If the instruction complained of be construed as a comment on the testimony, which, of course, we think not tenable, then the Government is in no better position. True, a transcript of the evidence is not before this court, but a well digested synopsis of the testimony of each witness is in the bill of exceptions, certified to by the trial court. An examination of this testimony, thus brought up in the record, will disclose in behalf of the defendant, (Pp. 175-176, Transcript of Record), that,

"C. E. Mitchell, defendant, identified letters, assay certificates, circulars, progress reports, telegrams, documents, and ore samples; in regard to the manner of securing the various properties mentioned in the indictment that in each case he had depended upon the reports of one or more mining engineers and had used their reports in the promotion of the properties; that he believed these reports to be true and he depended upon same; that he had in most cases confirmed said reports by personal investigation of the properties as well as through the expressed opin-

ion of many shareholders who visited these mines; that he never knowingly made any untruthful statement regarding any of the properties mentioned in the indictment;he denied absolutely the testimony of Dwyer, Wagner and each and every witness produced by the Government whose testimony tended in any manner to impute to him any dishonest act in connection with the promotion of any of the companies or corporations mentioned in the indictment and denied absolutely that he ever formed or intended to form a scheme or artifice to defraud of any kind or character or that he used or intended to use the post-office establishment of the United States in the furtherance or execution of any scheme or artifice to defraud of any kind. That he always conducted the business in an honest and open manner, having full faith in all the properties that he was promoting and believing at all times that investments made by various investors would be productive of profitable results and believed at all times that all of the statements and representations made by him were in all respects true."

This position of the defendant was substantiated by Rodrick, (P. 174, Transcript of Record), Thomas. (P. 174, Transcript of Record), McCullough, (P. 169. Transcript of Record), Aughey, (P. 168, Transcript of Record), Boyd, (P. 173, Transcript of Record), Weatherhead, (P. 173, Transcript of Record), Harvey, (P. 173, Transcript of Record), Cornish, (P. 172, Transcript of Record), Payne, (P. 172. Transcript of Record), Hosea, (P. 171, Transcript of Rec-

ord), McNorton, (P. 171, Transcript of Record), Pasold, (P. 170, Transcript of Record), Mocine, (P. 170, Transcript of Record).

We submit that when this court compares this testimony of the defendant with the testimony produced by the Government, it must conclude that at the very worst, all in all, the testimony for and against the defendant was at least evenly balanced. Even if it had been overwhelmingly against defendant, the instruction is erroneous, because courts cannot assume in instructions to juries that material facts on which parties rely are established, unless they are admitted or the evidence respecting them is uncontrovertible.

Knickerbocker L. Ins. Co. vs. Foley, 105 U. S. 99, 26 L. Ed. 1055.

Second Nat'l Bank vs. Hunt, 78 U. S. 391, 20 L. Ed. 190.

Starr vs. U. S., 153 U. S. 614, 38 L. Ed. 845.

Lucas vs. Brooks, 18 Wall. 436, 21 L. Ed. 779.

Washington & G. R. Co. vs. Gladmon, 15 Wall. 401, 21 L. Ed. 114.

Merchants Mut. Ins. Co. vs. Baring, 20 Wall. 162, 22 L. Ed. 252.

Lovejoy vs. U. S., 128 U. S. 171, 32 L. Ed. 389.

"No instruction to the jury should be given, which assumes, as a matter of fact, that which is not conceded or established by uncontradicted proof." Knickerbocker L. Ins. Co. v. Foley, *supra.*

"Where there is sufficient evidence upon a given point to go to the jury it is the duty of the judge to submit it calmly and impartially, and if the expres-

sion of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence if stated at all should be stated accurately, as well that which makes in favor of a party as that which makes against him; deductions and theories not warranted by the evidence should be studiously avoided. They can hardly fail to mislead the jury and work injustice." Burke vs. Maxwell, 81 Pa. St., 139, 153.

See also: Thompson on Trials, section 2293, 2294 and cases cited.

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight and that his lightest word or intimation is received with deference and may prove controlling." Starr vs. U. S., *supra.*

"Courts cannot assume in instructions to juries that material facts on which parties rely are established, unless they are admitted, or the evidence respecting them is uncontrovertible." Second National Bank v. Hunt, *supra.*

ASSIGNMENT OF ERROR NUMBERED 13 OF THE ASSIGNMENT OF ERRORS.

The instruction assigned as error under this assignment reads as follows:

"I will now revert to the first and most important element of the offense charged, namely, the devising of a scheme or artifice to defraud."

This instruction indicates very clearly the erroneous idea entertained by the learned trial court as to the construction of the statute under which the defendant was charged. We have heretofore pointed out that, while the formation of some scheme or artifice to defraud is an essential element of the offence charged, the gist of the offence is the use or attempted use of the United States mails for a forbidden purpose.

Lemon vs. U. S. 164 Fed. 952, (CCA);
Horn vs. U. S., 182 Fed. 721, (CCA);
U. S. vs. Clark, 125 Fed. 92, (CCA);
O'Hara vs. U. S., 129 Fed. 551, (CCA);
Post vs. U. S., 113 Fed. 852, (CCA);
Rudd vs. U. S., 173 Fed. 912, (CCA);
Post vs. U. S., 135 Fed. 1, (CCA);
U. S. vs. Ryan, 123 Fed. 634;
McKnight vs. U. S., 115 Fed. 972.

This erroneous view will be more striking when the instructions under the 17th and 18th assignment of errors are discussed. This element, in the consideration of the learned trial court, not only appears to have been to him the gist of the offence, but was, of itself, a continuing offence of such a nature that it permitted the Government to introduce in evidence letters written more than three years prior to the return of the indictment. Indeed, as the record will show, letters dated in 1904, being six years prior to the filing of the indictment, were, over the objection of defendant, permitted in evidence. Now when the learned trial court took from the consideration of the

jury the second and third elements and then permitted facts to be shown which had been in existence more than three years prior to the return of the indictment, and permitted a verdict to be rendered upon the theory that there was but one element in controversy he wiped out absolutely the statute of limitations in this case.

We shall have something further to say upon this question later in this brief. Our purpose in calling attention to it at this time is that the force and effect of this particular instruction might be fully understood by this court.

ASSIGNMENT OF ERROR NUMBERED 14 OF THE ASSIGNMENT OF ERRORS.

The instruction assigned as error under this assignment reads as follows:

"For the purpose of these instructions, I deem it sufficient to say that the scheme or artifice to defraud, devised by the defendant Mitchell as charged by the indictment, is substantially as follows: That the said Mitchell would cause to be incorporated the C. E. Mitchell Company, to be controlled and directed by him, for the alleged purpose of buying, selling and operating mines, quarries, mills, stores and conducting a general brokerage business in stocks; that said Mitchell would also secure the incorporation of the various other companies named in the indictment to conduct a mining business; that he would procure from such companies stocks which he would sell and dispose of by means of false and fraudulent repre-

sentations, as set forth in the indictment; that he would represent and pretend that he had knowledge at first hand, of the actual, present and prospective values of the properties and assets of said various companies, their development and progress, and that the development of the properties of said various companies was under the control and direction of the said C. E. Mitchell and said C. E Mitchell Company; that the stocks of the said various companies was of great value and would become of still greater value; that the properties owned by said various companies were of great value and would become of still greater value; that said companies had ore that could be shipped in paying quantities; that the stock of said companies was being offered for sale to secure funds to develop and equip the said properties; that the proceeds from the sale of all stocks of said companies were to be used to develop and equip said properties; that the stock of said respective companies would greatly enhance in value, and that said companies would pay dividends; that the said C. E. Mitchell well knew that all the aforesaid representations so made by him, and by and in the name of the C. E. Mitchell Company, under his direction, were misleading, false, untrue and fraudulent; that the stock of said various companies was not of the value so represented, and would not increase in value and become of greater value; that the properties of the said various corporations were not of the value so represented, and would not become of greater value; that said companies did not have ore capable of being

shipped in paying quantities, and that the corporations would not pay dividends; that the proceeds from the sale of the stock of said companies would not be used to develop the properties of said companies, but the same would be, and it was intended by the said C. E. Mitchell that a large part of the proceeds from the sale of the stock of said various companies would be by him fraudulently converted to his own use, and that it was the intent of the said C. E. Mitchell to fraudulently convert the moneys so obtained, or a large portion thereof, to his own use; which said scheme and artifice to defraud, devised by said Mitchell, was to be effected by opening correspondence and communication by means of the postoffice establishment of the United States with divers persons as might or could be induced to answer his advertisements, and to whom might be addressed the many circulars, reports and letters so sent and to be sent through the mails of the United States by the said C. E. Mitchell and the C. E. Mitchell Company by his direction; and that in and for executing the said scheme and artifice to defraud the said Mitchell did unlawfully deposit and cause to be deposited in the postoffice of the United States, in the city of Spokane, Spokane County, Washington, the three certain letters set forth in the three counts of the indictment."

We appreciate, of course, that this is an unusually lengthy instruction to be excepted to as a whole. However, an examination of the assignment of errors in the bill of exceptions will show that the exceptions

taken are very specific in pointing out wherein lies the error in this instruction. As will appear more fully hereinafter, the indictment charges that C. E. Mitchell had devised a scheme or artifice to defraud. It is difficult to determine the exact nature of the scheme or artifice in the mind of the pleader at the time the indictment was drawn. There is one thing certain that, construing the indictment in most liberal terms, giving to it the benefit of every inference and implication, the scheme or artifice described in the instruction is so much broader and contains so many other things that it is not a correct digest or synopsis of the indictment. The indictment undertakes to charge three things; first, the scheme or the artifice, second, the acts done in the furtherance of the scheme or artifice, and third, the use of the mails. The instruction enumerates all the acts done in the furtherance of the scheme, and then charges the jury that the indictment charges that these acts constituted the scheme or artifice. The charging part of the indictment sets forth the acts done in the furtherance of the scheme, but, when this same language is copied into the instruction of the court the jury is told by the court that these acts are the scheme itself.

It seems to us that this confusion, or rather erroneous statement, could have no other effect than to mislead and confuse the jury.

It will be noted that the learned trial court quoted from the indictment, as follows:

"That he would represent and pretend that he had knowledge at first hand of the actual, present and

prospective value of the properties and assets of said various companies, their development and progress, and that the development of the properties of said various companies was under the control and direction of said C. E. Mitchell and said C. E. Mitchell Company."

The court then characterizes these statements, taken from the indictment as "misleading, false, untrue and fraudulent."

This in our judgment is exactly opposite to what the indictment intends to charge. The indictment, as we read it, makes it very clear that these statements were existing facts. That is to say, the indictment charges that C. E. Mitchell and the C. E. Mitchell Company did have knowledge at first hand of the actual, present and prospective value of the properties and assets of the various companies mentioned in the indictment, as it is expressly charged that Mitchell organized these companies for the purpose of securing stock that he might sell to the general investing public, representing and pretending that the C. E. Mitchell Company was the fiscal and selling agent of the stock of the said various companies. In other words, the court characterizes the statements above quoted as a part of the false and fraudulent representations set forth in the indictment, while the indictment undertakes to describe these same representations as existing facts.

Again, it would be impossible for the jury, unlearned in the law, as juries always are, to understand these instructions in any other way than that the

court was telling them that all of the things he had enumerated in this instruction were false and fraudulent representations. Of course, to an analytical mind, this instruction, after being carefully analyzed, could be viewed in a different light, but we submit that at first reading this instruction bears the construction of placing the learned trial court in the position of telling the jury that the statement that "Mitchell would cause to be incorporated the C. E. Mitchell Company to be controlled and directed by him;" and that "Mitchell would also secure the incorporation of the various other companies named in the indictment to conduct a mining business, and that he would procure from such companies stocks, which he would sell and dispose of by means of false and fraudulent representations," would each and all of them be understood by the jury to mean that they constituted a part of the false and fraudulent representations which the learned trial court, by confusing with the actual false statement, as charged in the indictment, inferentially says were misleading, false, untrue and fraudulent.

Placed in this position, if the jury found that the defendant had organized the C. E. Mitchell Company, or organized the other companies mentioned in the indictment, all of which are charged and admitted facts, they would have no alternative but to return a verdict of guilty against the defendant, and the defendant would in this manner be convicted simply because he had organized the C. E. Mitchell Company.

and, in the furtherance of its business, deposited a letter in the post-office of the United States.

The importance of this instruction will more fully appear when the next assignment of error is noted.

ASSIGNMENT OF ERROR NUMBERED 15 OF THE ASSIGNMENT OF ERRORS.

"Now, gentlemen of the jury, if you are satisfied from the testimony in this case, beyond a reasonable doubt, that the defendant made one or more of the false representations charged in the indictment, *in the sale of the mining stocks therein described,* and that such false representations were so made in pursuance of a scheme or artifice to defraud previously devised by the defendant, which was to be effected by correspondence or communication with another person by means of the postoffice establishment of the United States and that in and for executing such scheme or artifice, the defendant deposited in the postoffice of the United States the several letters described in the different counts of the indictment, you will find the defendant guilty as charged."

At the inception of this instruction it will be noted that the court used the language "in the sale of the mining stocks therein described." For the first time in the history of this case appears the fact that mining stock was sold or that the selling of mining stock constituted a part of the offense charged in the indictment. The indictment is drawn upon the theory that the defendant devised a scheme or artifice to defraud, and, in the furtherance of that scheme, did cer-

tain acts for the purpose of creating a market for mining stocks of the various companies therein mentioned which he intended to sell, but nowhere in the indictment is it charged, and nowhere in the trial was it contended, that the defendant sold or disposed of any shares of mining stock. The theory of the indictment and case throughout was that there was simply an attempt to sell mining stock.

Again the jury is told that if "the defendant made one or more of the false representations charged in the indictment in the sale of the mining stock therein described," that they will find him guilty.

We submit that the instruction is so ambiguous that it was very easy for the jury to have understood the court to say that, if they found that the defendant had made any of the false or fraudulent representations set forth in the instruction that it would be necessary for them to find him guilty, and, if this be true, the jury would have been compelled to find the defendant guilty upon the mere showing that he had organized the C. E. Mitchell Company, as the court characterizes this act as one of the false and fraudulent representations.

ASSIGNMENT OF ERROR NUMBERED 17 IN THE ASSIGNMENT OF ERRORS.

"The case of fraud, as here stated, is among the few exceptions to the general rule that other offences of the accused are not relevant to establish the main charge."

In this instruction for the first time in the whole

proceeding develops "the case of fraud". The indictment does not charge fraud, the case was not tried upon that theory; at no time or place from the beginning to the end has this been recognized by either the prosecution or the defendant as a case of fraud. If it is a case of fraud, as the learned trial court suggests, then the indictment is fatally defective. If it is not, then the instruction is erroneous. This fraud theory, of course, permitted the jury to consider testimony of alleged crimes, other than those set forth in the indictment, and for this reason was very prejudicial to the rights of the defendant.

ASSIGNMENT OF ERROR NUMBERED 18 IN THE ASSIGNMENT OF ERRORS.

"Before you find the defendant guilty, therefore, you must find that the offence was committed within the three years next preceding the return of the indictment. It is not necessary, however, that the Government should prove that the scheme or artifice to defraud was devised within three years. If you find that such a scheme or artifice was devised more than three years prior to the return of the indictment, but that the scheme or artifice was still in existence and the defendant was operating under it within the three years, the case is still without the statute of limitations and may be prosecuted. It was for this purpose that certain letters were received in evidence which were written more than three years prior to the return of the indictment, and they can only be considered for the purpose of enabling you to determine

whether or not there was in fact a scheme or artifice to defraud."

Very few authorities can be found touching the first part of this instruction. On principle, however, it would seem that all of the elements of the offence charged should fall within the period of the statute of limitations, namely, three years.

This, of course, is the recognized general rule, the only exceptions being, (a), where a conspiracy is charged, and, (b), where the offence charged in the indictment is a continuing one.

Unless the offence charged in the indictment falls within one of these two exceptions the indictment is fatally defective, and the instruction above referred to erroneous.

We have not overlooked the late case of Wilson vs. United States, 190 Fed. 427, (Ad Sheets, Vol. 190, No. 4), nor have we overlooked the case of United States vs. Kissel, 218 U. S. 601, 54 L. Ed. 1168.

Both of these cases deal with an indictment where conspiracy is charged, and, following the general rule, hold that conspiracy is a continuing offence, and is, therefore, not barred by the statute of limitations, because its operation continued at least up to the date specified in the indictment.

The Wilson case, *supra,* also deals with a set of facts where unscrupulous promoters filched from the general investing public hundreds of thousands of dollars by their false and fraudulent scheme and conspiracy.

We submit that under no possible construction can

the indictment in this case be construed as charging conspiracy. "A conspiracy," says the Supreme Court of the United States in Pettibone vs. United States, 148 U. S. 197, 37 L. Ed. 419, "is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose, not in itself criminal or unlawful, by criminal or unlawful means."

We also submit that the offence charged in the indictment is not a continuing offence, for two reasons: (a) in the case of In re Henry, 123 U. S. 372, 31 L. Ed 174, the Supreme Court of the United States says:

"As was well said by the District Judge on the trial of the indictment, 'the act forbids not the general use of the postoffice for the purpose of carrying out a fraudulent scheme or device, but the putting in the postoffice of a letter or packet or the taking out of a letter or packet from the postoffice in furtherance of such scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act.' It is not, as in the case of Re Snow, 120 U. S. 274, a continuous offense, but it consists of a single isolated act, and is repeated as often as the act is repeated."

United States vs. Martin, (D. C.), 28 Fed. 812;
Packer vs. United States, 106 Fed. 906;
United States vs. Clark, 125 Fed. 92.

and, (b), a continuando is not alleged.

Wharton Crim. Pl., Sec. 474-475;
Bishop Crim. Proc., Sec. 394;
United States vs. La Coste, 2 Mason 129;
People vs. Adams, 17 Wendell 475;

Wells vs. Com., 12 Gray 326.

It is palpably apparent that if a violation of section 5480 were a continuous offence the indictment could contain but one count.

This is especially true under the facts in this case read in the light of the instructions. Here is a case where the government contends that the scheme or artifice was devised about six years prior to the return of the filing of the indictment (P. 144, Transcript of Record.)

The various acts in the furtherance of this scheme cover the period from 1904 down to October 14, 1907, being the date of the last letter set forth in the indictment. It will be remembered that the indictment was filed on April 9th, 1910; that the two other letters set forth in the indictment bear date July 17, 1907, and May 9, 1907. Therefore, all of the acts complained of took place between 1904 and October, 1907. Under the court's theory of the case, all of this testimony was admissable for the reason set forth in this instruction.

To make matters worse, the court had already taken from the consideration of the jury the second and third elements, leaving but the first element for their consideration, and then instructed them that it made little or no difference when this scheme was devised.

There can be no escape from the conclusion that this method pursued by the learned trial court absolutely wiped out the statute of limitations in this case, and, as set forth in the affidavit of the defendant, so

completely surprised him and his attorneys that he was prevented from having a fair trial.

We contend that the three elements should have been shown to have existed within the statutory period, and that the reception of letters dated more than three years prior to the return of the indictment was error.

We have included in the record aside from a digest of the testimony enough evidence to illustrate three important propositions: (Pp. 138-142, Transcript of Record).

First, that letters and documents dated as early as 1904, (P. 144, Transcript of Record), six years prior to the return of the indictment, were admitted in evidence over the objection of the defendant.

Second, that testimony regarding the value of the mines, and testimony regarding the condition of the properties of the various companies mentioned in the indictment was based upon investigations made long subsequent to the time the representations complained of were made.

Third, evidence was admitted to prove statements and representations made after the commission of the offence as charged in the indictment. (Pp. 164-166, Transcript of Record).

We do not wish to be placed in the position of seeming to extend this brief to an unnecessary length, but we feel it necessary, to properly advise the court upon the three propositions enumerated, to make the following observations:

The defendant was brought to trial in May, 1911,

upon an indictment returned in April, 1910. Three letters are set forth in the indictment, the last of which is dated October 14th, 1907. All the representations, in fact, all the acts in the furtherance of the scheme, as charged in the indictment, had taken place prior to this time, as the mailing of the letters was the consummation of the offence.

On the different properties mentioned in the indictment the Transcript of Record, page 164, shows as to the Government witness, Schrader:

"That he had made an examination of the Coeur d'Alene Eagle Mining property, being one of the properties mentioned in the indictment; that this examination was made in April, 1910; that he had examined nearly all of the property, "all of the most important part of it and with considerable detail around the main working." This testimony was admitted over the objection of defendant's counsel as to the phraseology "most important part of it." That the width of the vein was about fourteen or fifteen feet; that he took samples of the ore—one from the hanging wall side of each side of the tunnel and chamber and one from the drift and that these were given to the Fassett Company for assays; as to the statement made wherein speaking of samples it is said: "We sent to the assayer and got the assay late last night; it yielding $71.66 copper and $16.46 silver, a total value of $88.14 per ton. As the ore is all exactly alike in appearance, it is not possible to make a selected sample and we believe this is a fair test of the value of the ore," that he could not find any ore

in the workings at all and nothing there that would approach that, in a workable quantity. The answer was stricken upon motion of counsel for the defendant upon the ground that it was not responsive to the question. That in his opinion there was nothing to indicate that the property would ever be a mine. This answer was allowed over objection of defendant's counsel and exceptions duly allowed."

Again this same witness on page 163 of the Transcript of Record:

"That he had examined the Montana Mammoth mine, being one of the properties mentioned in the indictment, about April, and made a re-examination about September, 1910; that he examined the tunnels on that property and that there was only one tunnel of consequence, which answer, upon motion of defendant's counsel, was stricken; that the tunnel ran into slaty, shalistitic rock; that he took samples of the mine; asked as to the truth of the statement, dated November 27, 1907, as follows: "Every opening we have made on the surface from the foot of the mountain up to this point has been in ore—good ore, all ore," stated that this was untrue; asked as to the truth of statement under date of December 2, 1907, as follows: "The fact that the mine is now putting on the dump enough ore every day to pay several days' operating expenses means that we do not have to sell a dollar's worth of stock to pay for development," stated that this was untrue; asked as to the truth of statement made in Progress Report Number 14, August, 1907, referring to a statement of John M.

Scrafford, "Quoting from Dr. J. A. McLaughlin, of Dayton, Washington, the writer visited the Montana Mammoth and found a vein 40 feet in width at the tunnel mouth with wonderful surface showings. More than 1,000 tons of ore can be taken from the surface and dump and shipped to the smelter at once," that this statement was untrue as to the quantity of ore on the dump. This testimony was allowed over the objection of the counsel for defendant and exception duly allowed."

This character of testimony runs throughout the Government's case. It will thus be seen that Mr. Schrader, the Government's witness above mentioned, did not examine the property described by him until some time in April, 1910, or nearly three years after the last letter mentioned in the indictment was written and more than three years after the representations charged in the indictment were made. If a crime had been committed, it was consummated by the mailing of the letter, that is, the first count charged in the indictment would have been completed on the date of the mailing of the letter therein set forth, to-wit: on the 9th day of May, 1907, and in the second count on the 16th day of July, 1907, and in the third count on the 14th day of October, 1907. This being true, it necessarily follows that. all the false and fraudulent representations, as set forth in the indictment, would have been in existence prior to the 14th day of October, 1907. Now, to admit testimony to prove any act done after that date, to-wit: the 14th day of October, 1907, was a violation of one of the

fundamental rules of evidence. We have not overlooked the fact that this testimony was admitted by the learned trial court upon the theory suggested in his instructions, already discussed, that, "the case of fraud as here stated is among the few exceptions to the general rule that other offences of the accused are not relevant to establishing the charge." We have heretofore suggested in our discussion of this instruction that the indictment does not present a case of fraud as there is lacking from the indictment one of the essential ingredients necessary to constitute fraud, to-wit, some one must have been defrauded. However, even if the view of the learned trial court be entertained, and even if it be conceded that evidence of similar offences is relevant, we insist that they must be so connected in point of time as to be a part of the one connected scheme, or plan, and the transaction must not be of a remote nature. Certainly three years is too remote.

State v. Church, 43 Conn., 471;

Trogdan v. Commonwealth, 31 Gratt (Virginia), 862;

State v. Letourneau, 41 R. I., 351, 1 Atlantic 1048;

Todd v. State, 31 Ind., 514;

Commonwealth v. Jackson, 132 Mass., 16;

State v. Oppenheimer, 41 Wash., 630, 84 Pac., 588;

State v. Kelley, 65 Ver., 531; 36 Am. St. Report, 884;

State v. Bokien, 14 Wash., 403; 44 Pac., 889.

Mayer vs. People, 80 N. Y. 362.

Again this testimony should have been limited to proving the condition of the properties at the time the representations were made, and not the condition of the properties from three to six years after the representations were made.

This rule is especially applicable to mining properties. Probably every man in the Pacific Northwest who is at all familiar with mining and mining property understands, and recognizes the fact, that it is the most highly fluctuating character of property in the world today. A pocket, or faulty pay shoot today, will bring the operator into barren rock tomorrow.

Judge Hoffman as early as 1881 pointed out the uncertain character of mining property in In re South Mountain Consolidated Mining Company, 5 Fed., 403, and Judge Sawyer again reviews this question in 1882 (14 Fed., 347), and Judge Sanborn, in the recent case of Horn v. U. S., 182 Fed., 741, uses the following language:

"The value of mines and mining stocks are generally unknown. Those values are concealed in the ground and at the times of most of the sales of the mines and the stocks are unknowable. Such stocks and mines are sold and bought upon hope and faith, and not upon facts and reason. It would probably be a conservative statement to say that three-fourths of those who sell and buy them have no reasonable cause to believe that they control the ores or the values which they represent them to possess, or are worth

the prices which they respectively receive and pay for them. Yet these dealers are not generally criminals and do not intend to defraud each other although they represent and believe what they have no reasonable cause to believe and what the vast majority of citizens cannot believe on the evidence which is presented to them. Such men are simply more credulous and sanguine than the majority of mankind."

Indeed hundreds of specific cases, within the states of California and Washington, alone, could be suggested where three years ago a given property might present the most enthusiastic future, where the showing would justify most glowing, flattering and optimistic representations, and those same properties, if examined today, would demonstrate that they are wholly worthless, and those same representations, though true when made, would, in the light of later development, and examination, be false and fraudulent.

Such instances are as much matters of universal knowledge as the principle of natural philosophy that water will seek and, if unobstructed, find its level. Mining corporations are, in these particulars, *sui generis*. They are organized and carried on upon principles, in these respects, wholly different from other corporations and commercial enterprises.

Yet, despite these universal and common facts, the Government was permitted to introduce testimony of witnesses who had examined the properties in 1910, to show their condition in 1907, and even prior to 1907, when the Government was trying to prove that

the condition of the mines did not justify the representations made by the defendant as to their condition in 1907, and prior thereto.

ASSIGNMENT OF ERROR NUMBERED 18 OF ASSIGNMENT OF ERRORS.

In discussing this assignment of error, we recognize the general rule to be as suggested by this court in the late case of Hillman vs. United States, to the effect that the granting or refusing of a new trial is a matter within the sound discretion of the trial court, and that its action in the exercise of such discretion cannot be reviewed.

To this general rule, we contend that there are for the purpose of this case two well recognized exceptions: (a) That the rule has no application where such allowance or refusal results from a refusal of the trial court to consider such motion, together with the affidavits in support thereof; (b) That where the trial court abuses its discretion its judgment will be reversed because thereof.

We take it that the first exception suggested by us will be conceded by the attorneys for the Government, as we know of no authorities denying this exception.

Mattox vs. United States, 146 U. S., 140; 30 L. Ed., 917;

Ogden vs. United States, 112 Fed., 52 (C. C. A.);

Dwyer vs. United States, 170 Fed., 160 (C. C. A.);

Felton vs. Spiro, 78 Fed., 576 (C. C. A.).

On the second exception we are frank to concede that there are many general statements in the reports of adjudicated cases which would indicate that this exception does not exist. However, we contend that when these cases are analyzed in the light of those cases which have passed squarely upon this question all may be reconciled and brought within the rule we are here contending for.

In the early case of United States vs. Fries, 3 U. S., 515, 1 L. Ed., 701, being the first case to pass upon this question by the Supreme Court of the United States, a new trial was awarded on account of the previous declaration of a juror.

An examination of this case will disclose that it is squarely in point with the case at bar, and "after a solemn consideration of the subject, Iredell, J., delivered his opinion in favor of a new trial on the second ground of objection, that one of the jurors had made declarations, as well in relation to the prisoner personally as to the general question of the insurrection, which manifested a bias or pre-determination that ought never to be felt by a juror. He added that he did not regard the first ground of objection as insurmountable; but deemed it unnecessary to give a decisive opinion on it."

In so far as we have been able to determine, this case has never been overruled by the Supreme Court of the United States, and, therefore, stands as the law upon this question.

It was a case, as this is, where a juror had expressed

opinions prior to the trial that indicated bias or prejudice. On his *voir dire* examination he concealed this fact. A verdict of guilty was returned, and the error in overruling the motion for a new trial is, in the mind of the United States Supreme Court, sufficient for reversing the case upon this one ground alone.

The principle announced in this case applies to each and every ground of the motion for a new trial in the case at bar. It is inconceivable that the Supreme Court of the United States would grant a new trial where a juror had a preconceived opinion, and refuse to grant a new trial where there was in the case confessed perjury.

In the case of Higgins vs. United States, 185 Fed., 710 (C. C. A.), the Court uses this language:

"It is well settled that the granting or refusing of a new trial is a matter within the sound discretion of the trial court, and that its action in the exercise of such discretion cannot be reviewed. *It is also settled that if the trial court refuses to exercise or abuses its discretion its judgment will be reversed because thereof.*"

In James vs. Evans, 149 Fed., 136 (C. C. A.), the Court says:

"The rule that the allowance or refusal of a new trial rests in the discretion of the trial court, and will not be interfered with on a writ of error, *has no application where such allowance or refusal results from a clear abuse of discretion.*"

We do not understand this rule announced by these

authorities to be any different than the rule announced by practically every State Court in the United States. In other words, the refusing or the granting of a new trial has always been recognized to be a discretionary power, and will not be interfered with, unless there has been an abuse of such discretion.

To determine the question whether or not there has been an abuse of this discretionary power, as vested in the trial court, it is incumbent upon the appellate court to review the questions presented to the trial court upon the motion for a new trial. Any other construction makes the language "if the trial court refuses to exercise, *or abuses this discretion, its judgment will be reversed because thereof*" idle surplusage.

With these observations as to the general law governing the disposition of a motion for a new trial, we contend that the learned trial court did not exercise the discretionary power vested in it in the disposition of the motion for a new trial in this case.

The record in this case shows that after the verdict of guilty was returned by the jury a motion for a new trial was filed (Pp. 25-27, Transcript of Record), and while this motion was still pending, a petition and amended motion for new trial and affidavits in support thereof was filed. (Pp. 30-68, Transcript of Record). This petition was finally called on for hearing, and at the time it was heard the attorneys for the Government filed certain counter affidavits (Pp. 75-103, Transcript of Record). The motion was disposed of, and the petition denied

upon the understanding that additional affidavits might be filed by the defendant in support of his petition. These affidavits, filed by permission of court and consent of counsel for the Government (Pp. 104-129, Transcript of Record), were not taken into consideration by the learned trial court in the overruling of the petition and amended motion for new trial.

It will be plainly seen from this statement that the Court did not, and could not consider all of the affidavits filed by the defendant in support of his motion for a new trial.

Under the authorities above cited, it seems to us clear that it was the duty of the trial court to consider each and every affidavit filed by the defendant before overruling the motion for a new trial.

Before discussing the second exception, we suggest that the petition for a new trial, filed under rule 74, District Court Rules, is not to be governed by the same rule, in so far as the discretionary power of the trial court is concerned, as a motion for a new trial.

However, our position is that, upon the affidavits presented with the amended motion and petition for a new trial the defendant was entitled to a new trial, and the refusal of the court to grant him such new trial was such an abuse of discretion as to entitle the defendant to a reversal in this Court.

The defendant's petition and amended motion for a new trial set out three separate and distinct grounds, in addition to the reasons already discussed, whereby the petition should have been granted.

For the purpose of discussing this assignment of error in this brief we will consider such grounds under the same general classification.

(1) "Irregularity in the proceedings of the Court, jury and adverse party and abuse of the discretion of the Court by which the defendant was prevented from having a fair trial, in this: That the Court denied the defendant's motion for a bill of particulars and for an inspection of the papers on which the Government relied for its conviction, which prevented the defendant from being able to properly prepare for trial." (Pp. 30-31, Transcript of Record).

In support of this contention the affidavit of the defendant, C. E. Mitchell, was attached to the petition and amended motion for a new trial (Pp. 52-53-54, Transcript of Record), and substantially the same affidavit was attached to defendant's motion for a bill of particulars (Pp. 23-24, Transcript of Record), both of said affidavits being self-explanatory.

These affidavits have been controverted by the Government, and, therefore, stand as admitted as to all of the allegations therein set forth.

(2) "That the juror J. B. Carson had at the time of his acceptance as a juror a preconveived opinion against the defendant, and that said juror was opposed to, biased and prejudiced against the defendant at the time he was accepted as a juror, which facts he concealed by false and erroneous statements on his *voir dire* examination, as shown by the affi-

davit of D. A. Clement, which affidavit is attached to this motion and made a part hereof, marked Exhibit 'A'; also as shown by the affidavit of J. L. Ford, which said affidavit is marked Exhibit 'B,' attached to this motion and made a part hereof." (P. 31, Transcript of Record).

This assignment is supported by two affidavits, signed by D. A. Clement (Pp. 44-46, Transcript of Record) and J. L. Ford (Pp. 47-49, Transcript of Record), also the *voir dire* examination of the juror J. B. Carson.

It was conceded on the argument, when the petition and amended motion for a new trial was presented, that if these affidavits stated the facts, then the defendant would be entitled to a new trial. We assume that this same admission will be made to this Court by counsel for the Government; therefore, it becomes a question of the truthfulness or untruthfulness of the statement made by Clement and Ford. Neither of these men have any connection whatever with the defendant and no interest in the litigation; they are old and respected citizens of Spokane; their character is unquestioned.

In Dwyer vs. United States, 170 Fed., 160 (C. C. A.), the court, commenting upon a situation similar to this, uses this language: "Hope, in his affidavit, denies this, but I am constrained nevertheless to credit Meredith's statement. Meredith, it seems, is a respected farmer living in Van Buren County. His character is unquestioned. He appears to have no connection whatever with the plaintiff

and no interest in the litigation. What, therefore, could have moved him to fabricate such a statement as he has made and sworn to? What motive—what inducement had he to commit untrue and gratuitous perjury. Meredith's testimony is positive and affirmative; if false, it was willfully false; but Hope's denial is negative." Again, in the same case, "almost any juror when detected in such misconduct and arraigned for it will disclaim the influence upon his own mind of what he has uttered in violation of his duty. This is human nature. However, very few have the capacity or candor to speak with any reliable certainty of the elements which entered into their own minds in pronouncing a judgment or verdict. The only safe rule for the Court to follow is to form its judgment from the entirely logical consequences of the juror's words and conduct with little regard to his protestations in exculpation of himself." To the same effect was:

Simmons vs. United States, 142 U. S., 148, 35 L. Ed. 969;

Highman vs. Eames, 41 Fed. 676;

State vs. Cleary, 40 Kan. 287, 19 Pac. 776;

United States vs. Fries, 3 U. S. 514, 1 L. Ed. 701.

(3) "Surprise and accident which ordinary prudence could not have guarded against in that: The Court, on application of the attorneys for the defendant, decided that the prosecution should show to the defendant, or his attorneys, all the letters and documents which the Government would use at the

trial in the above entitled cause, and that thereafter the Court reversed said order, believing that he had exceeded his authority in making it. That the reversing of the order above referred to took place so near the day of the trial that it was impossible for the defendant to prepare his testimony to meet the evidence introduced on behalf of the Government, by reason of the fact that he was uninformed as to the nature of the testimony that would be introduced, and the witnesses who could have been produced were beyond his reach and could not be produced at the trial in time to rebut the testimony introduced by the government, all of which is more fully set out in the affidavit of C. E. Mitchell, hereto attached and made part hereof, marked Exhibit "C."

That the defendant was further surprised by the admission of many letters and documents dated beyond the statute of limitations controlling criminal actions, many of which letters and documents referred to matters and things not charged in the indictment, as shown by said affidavit of C. E. Mitchell, marked Exhibit "C."

That defendant was further surprised by the admission by the Court of that certain letter which was admitted during the cross-examination of the defendant, being a letter written by defendant in the year 1904 to one George D. Needy, which said letter had been previously rejected by the Court when offered in evidence by the Government.

That the defendant was further surprised by the perjured testimony of John L. Dwyer, as more fully

set forth in the affidavits of C. E. Mitchell, John L. Dwyer, Wilbur L. Welch, S. G. Woolfly, and Katherine Pigott, which affidavits are hereto attached and marked respectively Exhibit "C," Exhibit "D," Exhibit "E," Exhibit "F" and Exhibit "G."

That the defendant was further surprised by the perjured testimony of Von K. Wagner, as more fully set forth in the affidavits of C. E. Mitchell, John L. Dwyer, Wilbur L. Welch, S. G. Woolfly and Katherine Pigott, which affidavits are hereto attached and marked respectively Exhibit "C," Exhibit "D," Exhibit "E," Exhibit "F" and Exhibit "G." Also the affidavit of E. C. Gove, attached hereto and made a part hereof, marked Exhibit "H."

Directing the Court's attention particularly to the error based upon the testimony of John L. Dwyer, it will be remembered that John L. Dwyer was one of the witnesses for the Government and gave the most damaging testimony in the case against the defendant. His testimony was to the effect (P. 168, Transcript of Record) that, at the request of the defendant C. E. Mitchell he sent out samples of ore from the Anaconda mine which were labeled as samples from the Montana Mammoth (the Montana Mammoth being one of the corporations mentioned in the indictment); that Mitchell had offered him $200 and a ticket if he would go to British Columbia until the trial was over. This testimony tended to show not only fraud and deceit of the lowest character, but also tended to show bribery on the part of the defendant, Mitchell, and probably subornation

of perjury. We, therefore, repeat that it was the most damning testimony introduced by the Government against the defendant. This same witness, after the trial was over, and on the 27th day of June, 1911, wrote in his own handwriting a statement which he swore to before a notary public (Defendant's Exhibit "B" (Pp. 55-57, Transcript of Record). This statement of this witness is probably as remarkable a document as was ever filed in a case of this kind. We quote his own language here:

"Knowing that I have done C. E. Mitchell a severe wrong by my testimony in his recent trial, in the Federal Court, in the City of Spokane, in the month of May, 1911, my conscience bids me swear to the following facts:

"That some of my testimony was framed up for me by V. K. Wagner; namely, to swear that it was at Wagner's request that I swear on the stand that C. E. Mitchell had offered me two hundred dollars and a ticket to Vancouver, so as to be out of town at the time of the trial.

"That he (Wagner) insisted that I swear that I brought Anaconda ore from my home and at Mitchell's directions sent it out through the mail labeled Montana Mammoth ore.

"That I never seen Wagner bring any Black Cloud ore in Mitchell's office and send it out as Reliance ore, although that he insisted that I testify that I did. I knew that these statements which I testified to were false, but I was compelled to swear to them by V. K. Wagner, who threatened to expose

me on a personal matter, which he claimed would cause my arrest and imprisonment. When I was called in the court room during the trial to testify I remarked, when going down the stairs, to Wagner, that I would tell all the truth, he (Wagner) grabbed me by the arm and reminded me of his threat."

No more powerful affidavit can be given than one containing a complete confession of a great wrong done; a confession born in the agonies of conscience; christened in the belief that a grievous wrong will be righted. This affidavit is big enough to stand alone. Nevertheless, it is amply corroborated and supported.

The affidavit of Willard E. Mitchell (Pp. 109-113, Transcript of Record) corroborates Dwyer's confession and explains in detail the circumstances under which Dwyer came to make it.

The affidavit of Wilbur L. Welch (Pp. 57-59, Transcript of Record), one of the witnesses for the Government, corroborates a part of this affidavit.

The affidavit of Katherine Piggott (Pp. 62-63, Transcript of Record), another witness of the Government, adds light to this confession.

However, we deem it unnecessary to discuss the question as to whether or not the statements contained in this affidavit are true or untrue, as the learned trial court, on the presentation of the petition and amended motion for a new trial remarked substantially—"I do not want to hear his affidavit read. I didn't believe him when he testified, and I would not believe his affidavit"—so that the fact

remains that the most damaging testimony given in this case was perjury, confessed and admitted as such.

While it is perhaps not directly apropos, we beg liberty to digress for the moment, and to note that in the case of Ogden vs. United States, *supra,* the Court suggests that in cases where the affidavits in support of the motion for new trial are uncontradicted, it becomes the duty of the appellate court to grant a new trial thereon.

We are not going to take the time of this Court to cite authorities to the effect that the defendant would be entitled to a new trial in cases of admitted and confessed perjury. The effect of perjury in a criminal case is so awful in contemplation, so far reaching and disastrous in its effect that we deem it unnecessary to say but very little about it. It affects alike the liberty of the innocent, the foundation of society, and the integrity of courts of justice.

In the meadow of Runnymede, after generations of toil, slavery and sacrifice, a sturdy race wrung from King John of England a concession in the great march of humanity, civilization and human progress; that concession was christened the Magna Charta. This great document, the foundation of England's constitutional liberty, instilled new life, higher ambition and greater hopes in all mankind. It was the beginning and it is the foundation of popular government. The blackest charge against the ruling power of England for generations after the granting of the Magna Charta has been that political

prisoners were convicted and condemned as felons by perjury. As we read that history, in the light of modern jurisprudence, we are stunned and shocked, and our manhood rises in mental rebellion because it was even in that day a wild, reckless and remorseless brutality, sanctioned and used by a ruling power. In that day in the great temple of justice this poisoned serpent lurked to strike down freemen and condemn the innocent. It prostituted justice, robbed innocent men of their liberty and made courts and the administration of justice worse than a mockery. Down through the long, dark struggle for the uplift of humanity and the upbuilding of civilization and Christianity mankind for ages has been seeking to eliminate this evil. The voice of the ages has been "Thou shalt not bear false witness against thy neighbor." This injunction found embodiment in th laws of Manu long before the Christian era; was again embodied in the ten commandments, and was further emphasized by the Master, who declared that Christianity had come, not to destroy, but to fulfill the law.

When the colonies of America finally adopted the form of government as best suited the needs of the whole people, for the first time in history they made the courts one of the departments of that government. The people, disregarding the history behind them, constructed this department of the government that the inalienable rights of man as guaranteed in the Constitution might be protected and preserved. In reposing this extraordinary power in

the courts, the people placed the highest stamp of approval and confidence in that particular department. That confidence and that respect have grown in the American people from year to year, until the judiciary of this country, as well as courts, are looked upon with a high degree of reverence.

The high regard held by the writer for the courts and judges of this country prompts him to say that the confessed perjury of the witness Dwyer should not go unnoticed and unpunished. It is not a passing incident to be lightly considered. It is one of the most dangerous precedents ever permitted to creep into a court of justice. When perjury is committed and it is confessed, the defendant should have a new trial and the perjurer should be prosecuted.

True, the Government undertakes in a certain measure to justify their demand that this verdict, founded upon perjured testimony, stand, by reason of the fact that the mother and sister of the perjurer, Dwyer, have suggested that, on the date he signed the affidavit, confessing the perjury, he seemed to be under the influence of liquor or drugs of some kind. The date, of course, is guessed at by them. To refute their affidavits the notary who took the acknowledgements has filed his affidavit (P. 108, Transcript of Record). Two other disinterested witnesses, present at the time, positively dispel any doubt as to the condition of the witness Dwyer when he signed his sworn confession (Pp. 104-107, Transcript of Record).

He did commit perjury, and he did involve other

witnesses for the Government, particularly V. K. Wagner, the witness whom the learned trial court certifies to this court in the bill of exceptions (P. 168, Transcript of Record), as follows:

"That witness had made misrepresentations to his friends and had defrauded them out of money, and that he had made the misrepresentations knowingly, intentionally and dishonestly."

If Wagner, the witness involved by the Dwyer affidavit, would "knowingly, intentionally and dishonestly" defraud his friends out of money, is it not a sufficient indication that he would wrong his enemies if the opportunity presented, and the opportunity presented itself when he testified for the Government in this case.

The affidavit of Wilbur L. Welch (Pp. 57-59, and also Pp. 72-74, Transcript of Record), it will be observed, is attacked by the Government with expert testimony. The man Wagner also produced a letter, claimed to have been written by Welch, in which he (Welch), undertakes to repudiate his affidavit. This is the same Wagner whom we have heretofore referred to.

In reply to this attack the defendant filed affidavits of a number of qualified experts (Pp. 114-121, Transcript of Record). To eliminate all doubt, however, the affidavit of J. R. Brown (Pp. 125-126, Transcript of Record), a citizen of Spokane, where he has resided for more than eleven years, is filed, showing that the affidavit was signed by Welch in his presence and in the presence of the notary who

took his acknowledgment. We take it that the affidavit of Brown and the certificate and seal of the notary eliminate all doubt as to the genuineness of the Welch affidavit.

An interesting phase of the Government's showing is that Welch, one of the witnesses for the Government in the trial of the Mitchell case, had just been released from jail in Victoria a few days before he wrote the letter referred to (Pp. 96-97, Transcript of Record).

This makes three "interesting" witnesses produced by the Government to convict the defendant Mitchell.

ASSIGNMENT OF ERROR NUMBERED ONE IN THE ASSIGNMENT OF ERRORS.

"(a) The indictment does not charge that a scheme or artifice to defraud was devised by the defendant within three years next prior to the return or filing of the indictment;

"(b) The indictment does not charge that the offence was committed within three years next prior to the return or filing of the indictment."

We have heretofore suggested, and cited authorities in support of our suggestion, that to constitute a crime under Section 5480 it is necessary (1) that the defendant devised a scheme or artifice to defraud; (2) an intention to effect the scheme by means of the postoffice establishment of the United States, and (3) the depositing of a letter in the furtherance of the scheme.

Now, we suggest that all of these elements should

fall within the period of the Statute of Limitations. It will be remembered in this case that the indictment does not undertake to fix the time of the devising of the scheme, nor does the indictment undertake to fix any time when the acts in the furtherance of the scheme took place. The only dates mentioned in the indictment are mentioned in connection with the third element of the offense, to-wit, the date of the mailing of the letters.

Under such an indictment it would be possible for the Government to search a man's whole life to find evidence that would tend to prove the devising of a scheme, and then search his whole life and show every act that might, in any way, indicate that he intended to effect that scheme by the use of the post-office establishment of the United States, and then, by showing that a letter had been mailed within the three years prior to the return or filing of the indictment, find him guilty of the crime prohibited by Section 5480.

Such, we contend, cannot be the law. The devising of the scheme and the acts in the furtherance of the scheme must fall within the three-year period.

"(e) The indictment does not charge that any person was defrauded or that any person had been deprived of money or property by the alleged misrepresentations as set forth in the indictment;

"(f) The indictment does not charge that the defendant profited in any manner in any of the transactions as set forth in the indictment."

In Miller vs. United States, 174 Fed. 35, 98 C. C. A.

21, the alleged scheme grew out of an attempt of a manufacturing concern to sell additional capital stock by representations that it was desirous of establishing branch houses in different parts of the country, and of obtaining trustworthy men to manage such houses at a certain salary and extra profit; that its profits were 20 per cent, and that the company was paying 6 per cent on its stock. The complainants were induced to purchase stock, but did not secure the positions they expected as branch managers.

It was held that there was no intent to defraud shown within the meaning of the statute, in the absence of an allegation that the stock was not worth the price paid for it. The Court said:

"The mere intention of the plaintiffs in error not to meet the expectations of the persons responding to the letters, in the matter of their employment as branch house managers, and of their salary and profits, in consequence thereof, and of the earnings of the company, and the dividends therefrom, do not, in the absence of intended loss or injury to such persons in the investment made, constitute, in our opinion, a crime under Section 5480."

See also:

United States vs. Beach, 71 Fed. 160.

In Horn vs. United States, 182 Fed 727 (C. C. A.), the Circuit Court of Appeals of the Eighth Circuit uses this language:

"It is sufficiently averred that the stock of the

mining company was not of the value that the defendants were to falsely represent it to be."

This assumes, of course, and all of the authorities agree, that it is necessary for the indictment to charge the worthless character of the stock in cases of this kind.

Where it is necessary to charge a fact in the indictment, certainly it follows that that fact must be substantiated by the testimony. This being true, the Horn case recognizes the principle laid down in the Miller case, *supra,* to the effect that some one must have been defrauded.

It should not be forgotten in connection with this question that the defendant in this case is not charged with having sold mining stock, or any other kind of stock. If no stock was sold, certainly no one was defrauded.

It seems proper for us to state that most of the italics used throughout this brief are ours.

In conclusion, we respectfully submit:

First—That the demurrer to the indictment should have been sustained, and the defendant discharged;

Second—That the case at bar should be reversed and the defendant granted a new trial.

Respectfully submitted,

JOHN T. MULLIGAN,
FRANCIS D. ADAMS,
Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

C. E. MITCHELL,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

No. [redacted] 2040

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, EASTERN DIVISION.

BRIEF OF DEFENDANT IN ERROR.

OSCAR CAIN,
United States Attorney.
E. C. MACDONALD,
Assistant United States Attorney.

SHAW & BORDEN CO. 129836

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

C. E. MITCHELL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 2024

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, EASTERN DIVISION.

BRIEF OF DEFENDANT IN ERROR.

Believing it will be conducive to clearness, we will take up appellant's various assignments of error in the order adopted by his counsel in their brief.

Thus, commencing with the eighteenth assignment of error. Under this head, counsel contend that the judgment and sentence of the court is void for the reason that it provides

that the defendant shall be committed to the United States Penitentiary at McNeil's Island, at hard labor, for the period of one year.

Counsel insist that since Section 215 of the Penal Code does not prescribe "imprisonment at hard labor," but only "imprisonment" as a punishment for its violation, the court was without jurisdiction to pronounce that portion of the sentence.

Counsel further insist that under Section 5541 of the Revised Statutes, imprisonment in a penitentiary cannot be prescribed, except in cases where a longer period than one year is imposed. It will be observed that Section 5541 applies to imprisonment in state jails and penitentiaries and was passed March 3, 1865. (13 Stats., L. 500.) At the time of its passage, and for long after, the Federal Government kept and maintained no places of imprisonment. By the Act of March, 1891 (13 Stats., L. 839), the Attorney General is authorized to purchase three sites for the location of Federal penitentiaries, and to erect thereon buildings suitable for the confinement of persons whose term of imprisonment is one year, or more, at hard labor.

Pursuant to the authority given by this Act, the Attorney General purchased McNeil's Island, and erected thereon the penitentiary to which appellant was sentenced.

It will be seen by the foregoing that the term of imprisonment imposed upon appellant was sufficient to entitle him to admission to this institution. It only remains to determine whether the element of "hard labor" must be prescribed by the statute under which appellant was convicted in order to make McNeil's Island his legal place of imprisonment.

By the Act of March 4, 1909, the penal laws of the United States were codified, and the section, for the violation of which appellant stands convicted, was numbered 215. Neither

this, nor any other section of the code, prescribes "hard labor" as an element of punishment. If the contention of appellant's counsel is correct, then neither at McNeil's Island, nor any other institution erected pursuant to the Act of March 3, 1891 (26 Stats. L., 839), can a single person convicted of a violation of a Federal Statute be legally confined.

It has always been held, however, that where a prisoner is sentenced to confinement in a prison where hard labor is required as a part of the discipline of the institution, he will, upon his admission there, be subject to the rules in force, and as the Act under which the penitentiary at McNeil's Island was created prescribed "hard labor" as a part of the discipline of that place, appellant would have been required to perform such labor whether the sentence prescribed it or not.

In case of *United States vs. Pridgeon* (153 U. S., 48), Mr. Justice Jackson, speaking for the court, said:

"It admits of no question that the sentence, so far as it imposed imprisonment for the term of five years in the Ohio penitentiary, was regular and proper, and open to no objection. The question, therefore, narrows itself down to this: Was the sentence imposing that term of imprisonment rendered void by the addition of 'hard labor' during his confinement?"

"In *Ex parte Karstendick*, 93 U. S., 396, 399, the claim was made on behalf of the petitioner that 'where the punishment provided for by the statute is imprisonment alone, a sentence to confinement at a place where hard labor is imposed as a consequence of the imprisonment is in excess of the power conferred.' Mr. Chief Justice Waite, speaking for the court, answered this contention by saying: 'We have not been able to arrive at this conclusion. In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment alone, the several provisions which have been just referred to place it within the power of the court, at its discretion to order execution of the sentence at a place where labor is exacted as a part of the discipline and treatment of the institution or not, as it pleases. Thus a wider range of

punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever-varying circumstances of the cases which come before them. If the offense is flagrant, the penitentiary, with its discipline, may be called into requisition; but if slight, a corresponding punishment may be inflicted within the general range of the law.'"

"In the subsequent case of *In re Mills*,, 135 U. S., 263, 266, Mr. Justice Harlan said: 'An offense which the statute imperatively requires to be punished by imprisonment "at hard labor" and one that must be punished by "imprisonment" but the sentence to which imprisonment the court may, in certain cases and in its discretion, require to be executed in a penitentiary where hard labor is prescribed for convicts, are each "punishable" by imprisonment at hard labor. The former offense certainly must be thus punished; and as the latter may, in the discretion of the court, be so punished, it may also, and not unreasonably be held to be "punishable" by imprisonment at hard labor.'"

"Under the rule anounced in these cases, while the act of February 15, 1888, does not specifically authorize the imposition of 'hard labor' as a part of the sentence of imprisonment, still it was competent for the court to sentence the party convicted to imprisonment in a penitentiary where 'hard labor' is a part of the usual discipline; so that the provision for 'hard labor' in the sentence is nothing more or less than a sentence to simple imprisonment in the Ohio penitentiary, subject to its rules, regulations, and discipline, and if the sentence had been imposed in this form it could not justify the release of the prisoner on *habeas corpus* under the rule above announced. It is doubtful whether upon a writ of error the prisoner would have been entitled to a modification of his sentence by striking out the 'hard labor' portion thereof. By Section 5539 Rev. Stat., it is provided that 'wherever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any State or Territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State and Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory.'"

"Suppose the five years' sentence had embodied the provision of this section—which it could lawfully have done—would it have carried with it, in point of fact, 'hard labor' as a part of the discipline of the Ohio penitentiary? This being so, it is difficult to see upon what principle it can be held that

the sentence of imprisonment is vitiated and rendered void for expressly including the element or feature of 'hard labor' which would have been otherwise implied in the sentence of simple 'imprisonment.'"

If the court should find that the District Court exceeded its authority in imposing that portion of the sentence prescribing "hard labor," it will only necessitate amending the sentence by striking out the words "hard labor" and affirming the sentence in all other respects, as was done by this court in *Jackson vs. United States,* 102 Fed., 473.

See also:

In re Welty, 123 Federal, 122.
Ex parte Pecke, 144 Federal, 1016.
Ex parte Harlan, 180 Federal, 126.

XII.

Under this head appellant's counsel complain of the following language of the court's instructions:

"Under this section three matters of fact must be charged in the indictment and established by the evidence at the trial: First: That the defendant devised a scheme or artifice to defraud; Second: That such scheme or artifice to defraud was to be effected by correspondence or communication with another person by means of the postoffice establishment of the United States, and Third: That in carrying out such scheme or artifice to defraud the defendant deposited or caused to be deposited a letter in the postoffice of the United States. These three elements are set forth in the indictment in this case, and the question for your determination is, are they established by the evidence? I do not understand that there is any substantial controversy as to the second and third elements of the crime here charged. It appears from the testimony, without apparent contradiction, that the postoffice establishment of the United States was used exclusively by the defendant for the purpose of promoting the business in which he was engaged, and there seems to be no question that he at all times intended to so use it."

So long as appellant has not produced the evidence upon this point it will be presumed that the trial judge stated the

facts when he said: "I do not understand that there is any substantial controversy as to the second and third elements of the crime here charged." The language which follows shows clearly the application which the trial judge intended this language to have. The whole case was tried upon the theory, by the government, that the defendant's business was fraudulent, and by the defendant that it was legitimate, and the use of the mails, the intent to use the mails, and the mailing of the letters set forth in the indictment, were never in controversy. This is clearly shown by the substance of a portion of the arguments of both counsel for the government and the defendant set forth in the transcript of the record at pages 192 and 193.

XIII, XIV, XV AND XVII.

With reference to assignments of error numbered XIII, XIV, XV and XVII, we do not believe that they possess sufficient merit to warrant our trespassing upon the time and patience of the court with a reply.

XVIII.

Appellant's counsel have used the above number in three places in their brief, and we will follow the order adopted by them. At page 45 of their brief they contend that that portion of the court's instruction which informed the jury that it was not necessary that the government should prove that the crime or artifice to defraud was devised within three years, is erroneous. The whole theory of the law of fraudulent use of the mails seems to have escaped appellant's notice. That a fraudulent scheme may be devised and operated for years and the crime of unlawful use of the mails be committed every day in furtherance of it, is settled beyond all controversy.

If this were not the law, then a man who was fortunate enough to form a fraudulent scheme more than three years ago might now use the mails in furtherance of it with perfect impunity.

XVIII.

At page 56 of their brief counsel for appellant discuss, under the above numbered heading, the refusal of the court to grant appellant a new trial. All of the affidavits produced in support of their application were controverted by the government. Most of the affidavits were made by persons who had been witnesses at the trial; whose intelligence, demeanor and candor the court had had an opportunity to observe. For this reason, following the well-established rule that the granting or refusing of a new trial is a matter within the sound discretion of the trial court, the ruling of said court on that point will not be disturbed.

The position of the lower court should be affirmed.

Respectfully submitted,

OSCAR CAIN,
United States Attorney.
E. C. MACDONALD,
Assistant United States Attorney.

NO. 2043

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE F. STANLEY, Trustee, etc.,
Appellant,

vs.

PAJARO VALLEY BANK,
Appellee.

Appellee's Brief

H. C. WYCKOFF,
Attorney for Appellee

Circuit Court of the United States,
Ninth Circuit

GEORGE F. STANLEY, Trustee, etc.,
Appellant,
vs.
PAJARO VALLEY BANK, A Corporation,
Appellee.

Appellee's Brief

I.

As to the point made by appellant, that there is a failure to find on the issue of reasonable cause to believe that a preference was intended; counsel admits and states in his brief that this was a mere inadvertence in quoting the statute on the part of the trial judge, he having found that the defendant did not have reasonable cause to believe that the enforcement of the judgment would operate as a preference, instead of, in the words of the statute, that the defendant did not have reasonable cause to believe that a preference was intended.

We reply, first, that, this being admittedly a clerical inadvertance, it should not necessitate a reversal of the judgment, the intention on the part of the learned trial judge, having been clearly, to find in favor of the defendant on all the material issues.

Schroeder vs. Jahns, 27 Cal. 274.
Sherrid vs. Southwick, 43 Mich. 515.
Mulleneaux vs. Terwilliger, 50 Huu 526.

We reply, second, that the finding as made is broad enough to include the finding required by the statute and the pleadings. If the defendant did not have reasonable cause to believe that the enforcement of the judgment would operate

as a preference, it could not have had reasonable cause to believe that a preference was intended by the debtor; except perhaps on the theory that the debtor's intention to prefer was abortive or unfounded and that while he intended to prefer, his act did not have that effect; a condition of affairs quite fanciful; and one which would not impose any liability upon defendant. An intention to prefer upon which defendant could be held liable would necessarily involve, we submit, that the act complained of should operate as a preference.

Peiser vs. Griffin, 125 Cal. 9.

We reply, third, that the case is an equity case and was tried entirely upon the record of a bankruptcy proceeding and an agreed statement of fact stipulated to and signed by the attorneys for the parties; that under such circumstances, findings of fact are unnecessary and immaterial (Saltonstall vs. Russell, 152 U. S. 628); that the appellate court will in such a case practically try the case *de novo* upon the agreed facts and documentary evidence and arrive at a just and final decision therefrom, and if the judgment is right in the light of such evidence, any formal error in the findings will be disregarded as immaterial and unprejudicial.

Mound City Co. vs. Castleman, 187 Fed. Rep. 921;

Mt. Vernon, etc., Co. vs. Fred W. Wolf Co., 188 Fed. Rep. 164.

We reply, fourth, that there is no conflict in the evidence upon the issue as to which it is complained there is no finding (as we shall show later), and that any finding thereon must of necessity have been in favor of the defendant, and

therefore the error, if any, is immaterial.

Hutchings vs. Castle, 48 Cal. 152.

Callanan vs. Gilman, 107 N. Y. 360.

Krasky vs. Wollpert, 134 Cal. 338.

We reply, fifth, that upon the agreed facts and documentary evidence upon which the case was tried, the plaintiff has not (as we shall show later) sustained the burden of proof upon him to make out a case against the defendant; that the judgment is therefore right as a matter of law, and the formal error, if any, as to the special finding becomes immaterial.

The case therefore resolves itself into an examination of the facts in evidence to determine whether or not the judgment is right.

II.

The defendant bank made its first loan of $300 to Newman (afterward the bankrupt) on June 30th, 1908, upon his statement that he wished to discount some bills and that his stock was worth $3800; this valuation was roughly verified by an officer of the bank at the time. On August 31st, 1908, the bank loaned Newman $500 more upon his statement that with this amount he could pay all his bills and carry all his indebtedness with the bank. The moneys loaned were used for the payment of bills of wholesalers, as the bank learned from the checks drawn by Newman and which went through the bank. So far everything was regular and there was no ground for suspicion of any kind.

In the latter part of October, 1908, the cashier of the bank went to Newman's store to buy a set of harness, and

noticed that the stock was very materially depleted. He made inquiries on the outside and learned that Newman had been shipping his stock away and was intending to remove to Honolulu. This was treated, in accordance with business custom, as an act of bad faith toward the bank. It would naturally raise a suspicion that Newman was trying to get his property out of the country without paying the bank; it did not raise any presumption that he was trying to injure any other creditor or that there were any other creditors. The bank had been informed that the other creditors had been paid with its money, and it is a stipulated fact that the bank believed at all times, up to the commencement of the bankruptcy proceeding, that there were no other creditors. The cashier of the bank thereupon caused formal demand to be made on Newman for the payment of the notes, both of which were overdue. Upon his failure to pay, the bank caused its attorneys to commence suit against Newman on the notes and to attach the stock remaining in his store. This was done on October 27th, 1908. After the attachment had been levied and any further removal of the goods by Newman thereby prevented, the bank's attorneys made the arrangement with Newman's attorney to reduce its demand for the attorney's fees stipulated in the notes from $125 to $50 in consideration of Newman's filing his answer and going to trial immediately. Plaintiff insistently claims that this is conclusive evidence of fraudulent collusion. On the contrary, the arrangement was a sensible and proper one. It was not then known what the goods would bring at execution sale. The keeper's fees were $6 per day. The time saved, at this rate per day, more than compensated for the reduction in the attorneys' fees. It is

stipulated that Newman had no valid defense to the action, and we submit that the law does not require a defendant to make dilatory and unmeritorious defenses to an action for the purpose of delay when he can profit by such a course as was taken here. The property was sold under execution by the sheriff, the bank was paid the amount of its judgment and a small surplus was paid over by the sheriff to Newman. The petition in involuntary bankruptcy was not filed until nearly three months afterward, during all of which time the bank had no information that there were any other creditors and believed there were none. After the adjudication, the creditors slept on their rights for two years before they even elected a trustee in bankruptcy and did not commence this suit until March 23rd, 1911.

Counsel for appellant complains that the bank made no inquiries of Newman as to the existence of other creditors before commencing suit. Under the circumstances, it could not have done so prudently. It knew that its money had been used to pay other creditors and it learned that Newman was removing his stock, supposedly to defraud the bank. To have entered into negotiations with, or inquire of him, would have given him the opportunity to complete the removal of the stock to Honolulu and made it difficult and expensive and perhaps impossible to realize. It took the obviously proper and businesslike course of attaching the property, not to obtain a preference over other creditors, but to protect itself against the removal of the remaining stock by Newman. Its obligation as a trustee for its depositors required it to act promptly to protect itself from Newman. If it had gone to Newman and induced him to make a voluntary transfer of his property to satisfy the debt, the presump-

tion might have arisen that it knew or should have known more about his affairs. But it did not do this. It asked no favors of him, but protected itself against his act of bad faith by commencing an adversary proceeding. Newman did not give or intend a preference. His only intention was to cheat the bank by removing his goods from the jurisdiction. He was prevented from accomplishing this by the attachment, which, it is stipulated, was levied without any warning to him. Having tied up the property and defeated Newman's attempt to remove it, the bank proceeded by the arrangement above referred to, to close the matter up with as little expense and loss of time as possible. Such a transaction is neither uncommon nor improper. The bank was simply, by vigilance and prompt action, protecting itself against Newman, without having any knowledge or belief of the existence of the San Francisco and Los Angeles creditors. Newman's acts in expediting the closing of the matter were not prompted by any tenderness for the bank or any desire to further its interest. He furthered his own interest by reducing the amount of the judgment, and simply surrendered when his act of treachery to the bank was discovered and effectually frustrated.

Counsel says in his brief that the bank states and claims that it had no information as to the existence of other creditors and then argues that it must have had such information. In making such an argument he overlooks the fact that this want of information or belief on the part of the bank is not a claim made by the bank, but is the stipulated fact upon which the case was tried. And it is plain, we submit, that if the bank had no knowledge or information of the existence of any other creditors under the circumstances and believed

there were none, it could not have had reasonable cause to believe that there was an intent to prefer other creditors or to defraud them. He argues that the arrangement for an immediate trial of the attachment suit was done to accommodate the bank, in the face of the stipulated fact that it was done for the purpose of saving costs. The stipulated fact that Newman had no valid defense to the bank's action shows that Newman could not have prevented the procuring of the judgment if he had contested it.

It has never, we submit, been held and it is not the law, that a creditor, who has no knowledge or information of the existence of other creditors, when confronted with a situation where prompt action is required against a debtor who is removing from the jurisdiction the goods upon the faith of which its loan was made, may not proceed by the ordinary process of law promptly to protect itself. To so hold, would we submit, be to take away the incentive to that vigilance which the law is said to reward, and to paralyze creditors in their legitimate attempts to protect themselves from fraud by the processes which the law provides for that purpose.

We are unable to agree with counsel for appellant in his statement that the most important office of the writ of attachment is to enable one creditor to secure a preference over other creditors. It is more often resorted to, we submit, and its most important function, is to enable the creditor to obtain security for the debt as against his debtor, and thereby to prevent the removal, transfer or concealment by the debtor of his property pending the action. This was plainly the use which was made of it by the bank against Newman, and it raises no presumption that the bank had knowledge of the existence of other creditors.

We shall not undertake any extended analysis of the cases cited by appellant in his brief. They are, without exception, cases where voluntary transfers or payments were made by debtor to creditor. Where the action is voluntary and made at the request of the creditor, the inference naturally arises that he learned or should have learned something about the financial condition of the debtor. None of appellant's authorities presents the case which we have here of an adversary proceeding in court followed by sale on execution To sustain a judgment avoiding such a sale would, we submit, require clear proof of fraud and collusion, which is absent here. Cases are very rare where such sales have been attacked and they have been usually unsuccessful.

Nelson vs. Svea Pub. Co., 178 Fed. 136;

Hurlbutt vs. Brown, 55 Atlantic Rep. 1046.

The stipulated fact that the arrangement as to time of trial was for the purpose of saving costs, forecloses appellant from arguing that it was for the purpose of effecting a preference.

A mere suspicion that a preference is intended is not sufficient to warrant an avoidance of the transfer.

Tumlin vs. Bryan, 165 Fed. 166;

Irish vs. Trust Co., 163 Fed. 880;

Andrews vs. Kellogg, 92 Pac. Rep. 222;

Maekel vs. Bartlett, 91 Pac. Rep. 1064.

III

The burden of proof is upon the plaintiff to establish among the other elements of the cause of action, the insolvency of the debtor at the time of the alleged preferential transfer.

Morris vs. Tannenbaum, 26 Am. B. R. 368;

Utah Assn. vs. Boyle Furn. Co., 26 Am. B. R. 867.

There is no evidence in this case that Newman was insolvent on October 29th, 1908, the date of the rendition of the judgment. On August 31st, 1908, Newman's stock was worth $3800. The bank's debt was $800; the aggregate of the claims of the petitioning creditors in the bankruptcy petition was about $965. He was not therefore insolvent on August 31st, 1908. He was adjudicated bankrupt on January 20th, 1909. There is nothing to show when, between these dates, he became insolvent. For this reason, if for no other, a judgment in favor of plaintiff could not be sustained on this record.

It is respectfully submitted that the judgment appealed from is right and should be affirmed.

H. C. Wyckoff

Attorney for Appellee.

No. 2040

United States
Circuit Court of Appeals
For the Ninth Judicial Circuit

C. E. MITCHELL,
Plaintiff in Error,

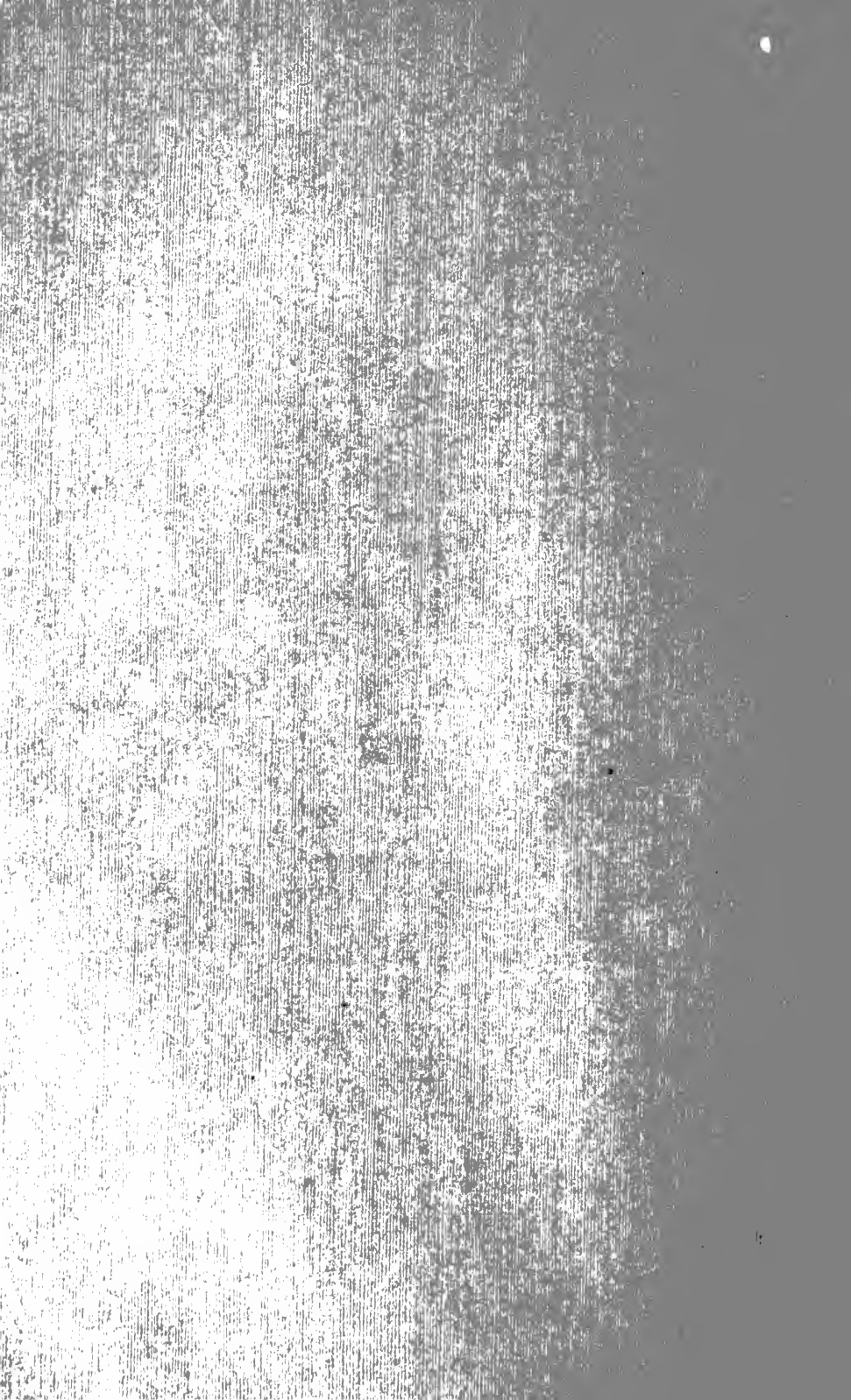
vs.

THE UNITED STATES of AMERICA,
Defendant in Error.

Petition for Rehearing

No. 2040

JOHN T. MULLIGAN,
Attorney for Petitioner and
Plaintiff in Error



No. 2040

United States
Circuit Court of Appeals
For the Ninth Judicial Circuit

C. E. MITCHELL,
Plaintiff in Error,

vs.

THE UNITED STATES of AMERICA,
Defendant in Error.

Petition for Rehearing

No. 2040

JOHN T. MULLIGAN,
Attorney for Petitioner and
Plaintiff in Error

The plaintiff in error, with all due respect to the opinion, filed herein, humbly prays this Honorable Court for a rehearing of this cause.

The grounds upon which this application is made are as follows, to-wit:

I.

The Court, in its opinion, has misconcieved and misapprehended three important assignments of error relied upon by the plaintiff in error, to-wit, Assignments Numbered One, Twelve and Eighteen.

II.

That Sec. 5480 Rev. Stat. of the United States, as amended by the Act of March 2, 1889, has been erroneously interpreted by this Court.

III.

The Court has failed to give due consideration to all of the assignments of errors necessary to a proper disposition of the questions involved.

IV.

The Court should have granted the plaintiff in error a new trial.

STATEMENT AND ARGUMENT.

The writer of the brief in this case, and this petition, is proud of the fact that not to exceed three or four petitions for rehearing have been filed by him during his

practice as a lawyer. In this case some of our contentions have been so clearly misunderstood that it is truly embarrassing, which alone would compel us to ask this Court to reconsider its holdings. For this misunderstanding the writer assumes all the responsibility. The record and brief of the plaintiff in error were prepared in a very short period of time by one who took no part in the trial of the cause, and therefore they do not clearly state the several errors urged.

In disposing of Assignment of Error Numbered Twelve, the Court after quoting the instruction complained of says:

"It is contended that this instruction was error for which the judgment should be reversed for the reason that the second element as described in the instruction characterizes the scheme as an artifice to defraud, and that the Court thereby assumed that the guilt of the plaintiff in error was established beyond controversy, whereas, in fact, all that had been established or admitted was that the business carried on by the plaintiff in error, which was the subject of the indictment, was conducted through the mails."

This is clearly a misconception of our contention. We made two objections to this instruction. Our first contention was that the learned trial Court by this instruction took from the consideration of the jury the second and third elements of the offense charged. Our position was that the second and third elements con-

stitute the gist of the offense and were therefore necessary questions to be submitted for the determination of the jury, and when the Court by his language withdrew or took those elements or either of them from the consideration of the jury he committed a reversible error. Not "for the reason that the second element as described in the instruction characterizes the scheme as an artifice to defraud," but because he took the second and third elements from the consideration of the jury. The attorneys for the defendant in error did not either in their brief or at the oral argument take issue with the proposition of law contended for by us, namely, that the second and third elements of the offense charged were questions for the determination of the jury.

Therefore, the issue was squarely drawn as to whether or not the language of the learned trial Court led the jury or would lead reasonable men to believe that the second and third elements were by this instruction taken from their consideration. That was the first question for the determination of this Court, and, if it can be said, in the light of fair and reasonable interpretation, that by this instruction the jury might have understood the learned trial Court to be taking those two elements from their consideration, it would certainly be a reversible error. Feeling as we do, that the Court has misconceived our contention, we feel justified in asking the Court to reconsider its ruling on this instruction. To

our mind, the language of the instruction is plain, unambiguous and direct. "I do not understand that there is any substantial controversy as to the second and third elements of the crime here charged." It is a plain statement. The two elements referred to had already been described to the jury and constituted under the definition of the Court every element of the offense save and except the devising of the scheme. Even the criminal intent and the intent to defraud is found in these two elements under the Court's instructions. Not withstanding all this the learned trial Court in plain language tells the jury that there is no substantial controversy as to their existence. The fact that the Court in the following sentence uses the language: "It appears from the testimony without apparent contradiction that the postoffice establishment of the United States was used extensively by the defendant for the purpose of promoting the business in which he was engaged and there seems to be no question that he at all times intended to so use it" could not, in our judgment, justify the conclusion that there was no controversy as to the second and third elements. To make it clear let us transpose for a moment the sentences and see if there can be any doubt as to the effect of this instruction upon the mind of the jury. "It appears from the testimony without apparent contradiction that the postoffice establishment of the United States was

used extensively by the defendant for the purpose of promoting the business in which he was engaged, and there seems to be no question that he at all times intended to so use it." Therefore, "I do not understand that there is any substantial controversy as to the second and third elements of the crime here charged," which, are "second that such scheme or artifice to defraud was to be effected by correspondence or communication with another person by means of the postoffice establishment of the United States, and third, that in carrying out such scheme or artifice to defraud the defendant deposited or caused to be deposited a letter in the postoffice of the United States." We have not overlooked the suggestion of this Court to the effect that in another part of the instructions the Court properly submitted to the jury the question at issue in the case. This instruction, as we suggested in the oral argument could not, in our judgment, cure the error already committed.

In the case of Hibbard vs. United States, 172 Fed. 66, the Circuit Court of Appeals in the seventh circuit in a case squarely in point says:

"Although the cardinal rules (a) that innocence must be presumed and (b) that intent to defraud must be proven beyond reasonable doubt are repeatedly stated in the instructions, we are of opinion that the above mentioned instruction as to intent presumed by

law was erroneous and confusing upon that issue, and not cured (as counsel for the government contend) by the other instructions referred to. The intent may rightly be inferred from the circumstances in evidence; but it is an inference of fact—not a presumption of law."

We believe that the law is settled by the unquestioned weight of authority that an erroneous instruction plain and unambiguous upon its face cannot be cured by a later instruction attempting to qualify it. In the language of Justice Field:

"The law of our country takes care or should take care that not the weight of a judge's finger shall fall upon any one except as specifically authorized."

Our second objection to this instruction was that the language of the Court was such that it assumed the existence of a scheme or artifice to defraud and further assumed that this scheme or artifice to defraud was devised by the defendant.

This conclusion is reached by reason of the fact that the first and second elements defined in this instruction are so interwoven that an admission of the existence of the second element is an admission of the existence of the first, and further that the first and third elements under this instruction are so interwoven that an admission of the existence of the third element is an admis-

sion of the existence of the first. These, as we have already said, are our two objections to the instructions under discussion, and as neither of these contentions are mentioned in the opinion of this Court we feel justified in reaching the conclusion that this Court misconceived and misinterpreted our contentions and our objections to this instruction.

Disposing of the Assignment of Error Numbered Eighteen the opinion of the Court is, "We have no authority to review the rulings of the Court below on the motion for a new trial, which is assigned as error." This assignment presents more than an ordinary case of reviewing the refusal of the trial Court to grant a new trial. At the time our brief was prepared we had examined all of the cases in the United States Supreme Courts from the case of U. S. vs. Fries, 3 U. S. 515, to the Hillman case very recently decided by this Court. We were, therefore, well advised that it had been frequently decided that the allowing or refusal of a new trial rests in the sound discretion of the trial Court. That there are, of course, exceptions to this general rule does not admit of doubt, and under the circumstances in this case we felt and still feel that we were sufficiently within the exceptions to justify this Court in reviewing the assignment. This assignment may properly be reviewed, by this Court, under the authority of any of the following cases:

The United States vs. Fries, 3 U. S. 515; 1 L. Edd. 701;

Mattox vs. United States, 146 U. S. 140; 30 L. Edd. 917;

Holmgren vs. U. S., 217 U. S. 509; 54 L. Edd. 861.

Ogden vs. U. S., 112 Fed. 52 (C. C. A.);

Dyer vs. U. S., 170 Fed. 160 (C. C. A.);

Felton vs. Spiro, 78 Fed. 576 (C. C. A.).

A reexamination of the record in this case, we believe, will convince this Court that under this assignment there is involved more than the technical question of the right of this Court to review the act of the trial Court in denying the motion for a new trial. The questions presented under this assignment involve the right of a fair trial; they involve every constitutional provision guaranteeing the protection of civil rights to the citizens of this government; they involve the right of appeal from an erroneous judgment and the reviewing of prejudicial errors; they involve the very liberty of a citizen wrongfully, as we believe, convicted. To us it seems inconceivable that the grave and extraordinary questions raised under this assignment should be determined by the technical rule governing the review of a motion for new trial. It is inconceivable, to our mind, that precedent should become so fixed, so rigid, so harsh as to defeat the important and far-reaching propositions raised under this assignment.

That plaintiff in error was convicted on perjured testimony does not admit of doubt under the record in this case. That all the affidavits could not be considered and were not considered by the trial Court is equally clear. Should the affidavits filed by the plaintiff in error, disclosing the important matters they do, go unreviewed because of technicality? The lower Court could not review them because they were filed after the disposition of the motion for new trial, for we were compelled by the action of the District Attorney to file them, with the consent of the Court, after the disposition of the motion, therefore, our only remedy and our only relief was to appeal to this Court, by reason of the extraordinary situation that confronted us, to review these affidavits and determine whether or not the plaintiff in error should have a new trial.

Under the Assignment of Error Numbered One the case of Miller vs. United States, 174 Fed. 35 (C. C. A.) was cited by us as being squarely in point upon the proposition of law that someone must have been defrauded. Up to the time of the writing of our brief but two jurisdictions in the United States had passed squarely upon this question. If the Miller case above cited is to be approved in this jurisdiction then the indictment is faulty and the demurrer thereto should have been sustained. If this Court intends to refuse to follow the rule of law announced in the Miller case, then

we feel in justice to the bar that this Court should in express language overrule it. For this reason we ask the Court to reconsider this assignment.

Most respectfully submitted,

JOHN T. MULLIGAN,

Attorney for the Plaintiff in Error and Petitioner.

I, John T. Mulligan, attorney for the above named Plaintiff in Error, hereby certify that in my judgment the above and foregoing petition for a rehearing is well founded and that it is not interposed for delay.

John T. Mulligan

No. 2045

United States
Circuit Court of Appeals
For the Ninth Circuit.

G. W. HINCHMAN, WILLIAM HOLGATE, JOHN G. MORRISON, J. A. NETTLES, CORTEZ FORD, TOM VALEUR, R. M. ODELL, D. BUTRICH, E. J. BERGER, IDA JOHNSON, M. E. HANDY, FRED HANDY, G. C. DE HAVEN, TIM CREEDON, BENJAMIN A. MAHAN, THOMAS DRYDEN, ED. FAY, JAMES FAY, H. FAY, W. W. WARNE, THOMAS VOGEL, C. BJORNSTAD, H. RAPPOLT, KAREN BJORNSTAD, M. V. McINTOSH, MARY V. McINTOSH, JESSE CRAIG, E. A. ADAMS, J. W. MARTIN, A. J. DENNERLINE, S. J. WEITZMAN, PETER JOHNSON, MRS. KATE KABLER, and V. READ,

Appellants,

vs.

SOLOMON RIPINSKY,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

No. 2045

United States
Circuit Court of Appeals
For the Ninth Circuit.

G. W. HINCHMAN, WILLIAM HOLGATE, JOHN G. MORRISON, J. A. NETTLES, CORTEZ FORD, TOM VALEUR, R. M. ODELL, D. BUTRICH, E. J. BERGER, IDA JOHNSON, M. E. HANDY, FRED HANDY, G. C. DE HAVEN, TIM CREEDON, BENJAMIN A. MAHAN, THOMAS DRYDEN, ED. FAY, JAMES FAY, H. FAY, W. W. WARNE, THOMAS VOGEL, C. BJORNSTAD, H. RAPPOLT, KAREN BJORNSTAD, M. V. McINTOSH, MARY V. McINTOSH, JESSE CRAIG, E. A. ADAMS, J. W. MARTIN, A. J. DENNERLINE, S. J. WEITZMAN, PETER JOHNSON, MRS. KATE KABLER, and V. READ,

Appellants,

vs.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

LEWIS P. SHACKLEFORD and W. S. BAYLESS and ALFRED SUTRO, Attorneys for Plaintiffs.

Address: Juneau, Alaska.

JOHN H. COBB and R. W. JENNINGS, Attorneys for Defendant.

Address: Juneau, Alaska.

In the District Court for the District of Alaska, Division No. 1 at Juneau.

No. 547–A.

G. W. HINCHMAN, WILLIAM HOLGATE, JOHN G. MORRISON, J. A. NETTLES, CORTEZ FORD, TOM VALEUR, R. M. ODELL, D. BUTRICH, E. J. BERGER, IDA JOHNSON, M. E. HANDY, FRED HANDY, G. C. DE HAVEN, TIM CREEDON, BENJAMIN A. MAHAN, THOMAS DRYDEN, ED. FAY, JAMES FAY, H. FAY, W. W. WARNE, THOMAS VOGEL, C. BJORNSTAD, H. RAPPOLT, KAREN BJORNSTAD, M. V. McINTOSH, MARY V. McINTOSH, JESSE CRAIG, E. A. ADAMS, J. W. MARTIN, A. J. DENNERLINE, S. J. WEITZMAN, PETER JOHNSON and MRS. KATE KABLER, V. READ,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Complaint.

Come now the plaintiffs above named and complain of the defendant and allege:

I.

That the plaintiffs above named, and each of them, are citizens of the United States and residents and occupants of property in the town of Haines, in the District of Alaska, and residents of and in the occupancy of lands embraced in Survey, No. 573, at Haines, Alaska, and that all of the land embraced in the said United States Survey No. 573, situated in the town of Haines, Alaska, is more particularly described as follows, to wit:

Beginning at cor. No. 1, under Ripinsky's house, from which point U. S. L. M. No. —— bears S. 6° 45′ W., 2.64 chains distant, witness cor. bears W. 30 links, a stone marked S. 573 W. C. 1; thence from true cor. No. 14° 20′ E., along mean high-water mark of Portage Cove, 2.30 chains to cor. No. 2, not [1*] set, witness cor. bears W. 30 links, a stone marked S. 573 W. C. 2; thence from true cor. W. 9.10 chs. to cor. No. 3, an iron pipe 3 inches in diam. marked S. 573 C. 3; thence N. 3.16 chs. to cor. No. 4, a granite stone marked S. 573 C. 4; thence N. 31.17 chs. to cor. No. 5, a stone marked S. 573 C. 5; thence S. 1.68 chs. to cor. No. 6, a stone marked S. 573 C. 6; thence S. 80° 54′ E. along north line of Presbyterian Mission, 34.00 chs. to cor. No. 7, an iron pipe marked S. 573 C. 7; thence N. 1.67 chs. to cor. No. 8, an iron pipe marked S. 573 C. S.; thence E. 6.23 chs. to cor. No. 1, the place

*Page-number appearing at foot of page of original certified Record.

of beginning. Magnetic variation at all corners 28° 30′ east; containing 15.40 acres, is within the exterior boundaries of the town of Haines, in the District of Alaska.

II.

That all of said lands embraced in said survey No. 573 have been ever since December, 1897, and now are, settled upon and occupied as a townsite and are not subject to entry under agricultural pre-emption laws or otherwise than under the laws of the United States applicable to public lands settled upon and occupied as a townsite, and that the plaintiffs now are and have been ever since December, 1897, in possession and occupation in good faith of all of the lands embraced in said survey No. 573, hereinbefore described; that all of said lands embraced in said survey No. 573 constitute the principal business section of the town of Haines, Alaska, and that plaintiffs are occupying in good faith, and have at all times been occupying in good faith, said lands since the said month of December, 1897, for business and residential purposes; and that these plaintiffs have constructed buildings, such as stores, hotels, residences, etc., in value exceeding the sum of $50,000.00.

III.

That these plaintiffs have applied to the proper officers in the United States Land Office for a survey of said lands embraced within said survey No. 573 for the purpose of entering the same as a townsite under the laws of the United States in such cases made and provided including all of the lands embraced within the exterior boundaries of the town of [2]

Haines, Alaska, and that it is the intention of the plaintiffs and the occupants of the said town of Haines to apply for a United States patent to the lands embraced in said townsite and in said survey No. 573.

IV.

That the defendant Solomon Ripinsky claims an interest and estate in and to the said lands embraced within the said survey No. 573 adverse to these plaintiffs.

V.

That the said defendant Solomon Ripinsky has never occupied any of the said lands within the said Survey No. 573 except two small parcels, one 25x150 feet, which he acquired by purchase from one H. Fay, and another 100x150 feet which he occupies as a residence.

VI.

That on the 17th day of July, 1903, the said Solomon Ripinsky filed or caused to be filed a pretended location notice in the United States Commissioner's office at Skagway, in the District of Alaska, attempting to and claiming to locate all of the lands embraced within the exterior boundaries of the U. S. Survey No. 573 as a homestead; that at the time of filing said pretended location notice all of the said lands embraced within the said location notice and within the said Survey 573 were occupied by the residents and citizens of the town of Haines, Alaska, and these plaintiffs have certain townsite holdings within the town of Haines, and that none of said lands were held by the said Solomon Ripinsky as a homestead,

and in truth and in fact none of said lands were occupied by said Solomon Ripinsky save and except the two parcels herein described; that the location by the said Solomon Ripinsky of said lands was not in good faith and that said Solomon Ripinsky well knew that the said lands were not subject to location for homestead purposes.

VII.

That on or about the 2d day of March, 1906, the said Solomon Ripinsky filed in the United States Land Office at Juneau, Alaska, his application for a patent to the lands embraced within said U. S. Survey 573; [3] that thereafter a notice was issued and published by the Register and Receiver of the United States Land Office at Juneau, Alaska, of the application of the said defendant for the lands embraced in the said Survey No. 573; that to wit on June 3d, 1906, and within thirty days after the period of publication of said notice the plaintiffs herein duly filed in the United States Land Office at Juneau, Alaska, their notice of adverse claim, a copy of which is annexed hereto and marked Exhibit "A."

WHEREFORE, the plaintiffs pray that decree be entered herein adjudging and decreeing:

1. That the said property included with the exterior boundaries of Survey No. 573 is not subject to application for patent on the part of the defendant herein and is and was not subject to location as a homestead.

2. That the plaintiffs herein be adjudged and decreed to be entitled to the lands embraced in the said U. S. Survey No. 573 as against the defendant, save

and except the two parcels of lands herein mentioned, which are in the actual occupation of the said defendant.

3. That the defendant be perpetually enjoined from proceeding with his said application for patent under the homestead laws, and that the title of the plaintiffs herein and their right to the possession and occupation of the lands described in the said Survey No. 573, save and except the two parcels of lands hereinbefore mentioned, be determined to be paramount to the claim of the defendant herein; and that any claim, interest or estate which the defendant may set forth to the said property be forever quieted in favor of these plaintiffs.

4. For plaintiffs' costs and disbursements herein laid out and expended, and for such other and further relief as to the Court may seem meet and proper.

SHACKLEFORD & LYONS,
Attorneys for Plaintiffs. [4]

Exhibit "A" [to Complaint].

IN THE UNITED STATES LAND OFFICE AT JUNEAU, ALASKA.

In the Matter of the Application for Patent for Homestead Claim by SOLOMON RIPINSKY.

G. W. HINCHMAN, WILLIAM HOLGATE, JOHN G. MORRISON, JAMES A. NETTLES, CORTEZ FORD, TOM VALEUR, R. M. ODELL, D. BUTRICH, E. J. BERGER, IDA JOHNSON, M. E. HANDY, FRED HANDY, G. C. DE HAVEN, TIM

CREEDON, BENJAMIN A. MAHAN, THOMAS DRYDEN, ED. FAY, JAMES FAY, H. FAY, W. W. WARNE, TIM VOGEL, C. BJORNSTAD, H. RAPPOLT, CAREN BJORNSTAD, M. V. McINTOSH, MARY V. McINTOSH, JESSIE CRAIG, E. A. ADAMS, J. W. MARTIN, A. J. DENNERLINE, S. J. WEITZMAN, PETER JOHNSON and MRS. KATE KABLER, and V. READ,

Adverse Claimants.

Adverse Claim.

To the Honorable Register and Receiver of the United States Land Office at Juneau, Alaska:

Your adverse claimants, G. W. Hinchman, William Holgate, John G. Morrison, James A. Nettles, Cortez Ford, Tom Valeur, R. M. Odell, D. Butrich, E. J. Berger, Ida Johnson, M. E. Handy, Fred Handy, C. C. De Haven, Tim Creedon, Benjamin A. Mahan, Thomas Dryden, Ed. Fay, James Fay, H. Fay, W. W. Warne, Tim Vogel, C. Bjornstad, H. Rappolt, Caren Bjornstad, M. V. McIntosh, Jessie Craig, Mary V. McIntosh, E. A. Adams, J. W. Martin, A. J. Dennerline, S. J. W*w*eitzman, Peter Johnson, and Mrs. Kate A. Kabler, and V. Read to the application for patent for homestead claim for land embraced in Survey No. 573 at Haines, Alaska, respectfully show:

1. That all of your adverse claimants are citizens of the United States and residents of the town of Haines, Alaska. [5]

2. That all of the land embraced in said United States Survey No. 573, for which Solomon Ripinsky has applied to your office for patent as a homestead and which land is more particularly described as follows, to wit:

Beginning at a cor. No. 1, under Ripinsky's house, from which point U. S. L. M. No. —— bears S. 6° 45′ W., 2.64 chains distant, witness cor. bears W. 30 links, a stone marked S. S. 573 W. C. 1; thence from true cor. N. 14° 20′ E., along mean high-water mark of Portage Cove, 2.30 chns. to cor. No. 2, not set, witness cor. bears W. 30 lks., a stone marked S. 573 W. C. 2; thence from true cor. west 9.10 chs. to cor. No. 3, an iron pipe 3 inches in diam. marked S. 573 C. 3; thence N. 3.16 chs. to cor. No. 4, a granite stone marked S. 573 C. 4; thence W. 31.17 chs. to cor. No. 5, a stone marked S. 573 C. 5; thence S. 168 chs. to cor. No. 6, a stone marked S. 573 C. 6; thence S. 80° 54′ E. along north line of Presbyterian Mission, 34.00 chs. to cor. No. 7, an iron pipe marked S. 573 C. 7; thence N. 1.67 chs. to cor. No. 8, an iron pipe marked S. 573 C. 8; thence E. 6.23 chs. to cor. No. 1, the place of beginning. Magnetic variation at all corners 28° 30′ east; containing 15.4 acres, is within the exterior boundaries of the town of Haines, in the District of Alaska.

3. That all of your adverse claimants are *bona fide* residents of said town of Haines, Alaska, and are now, and have been at all times since December, 1897, in possession and occupation, in good faith, of all of the land embraced within said survey No. 573 and hereinbefore described; that all of said land embraced in said survey, and hereinbefore described, consti-

tutes the principal business section of the town of Haines, Alaska, and that your adverse claimants are occupying in good faith and have been at all times occupying said land in good faith since December, 1897, for business and residential purposes; that your adverse claimants have constructed buildings, such as hotel structures for business purposes, residences, etc., in value exceeding the sum of $50,000.00. [6]

4. That it is the intention of your adverse claimants to join all of the citizens of the town of Haines, Alaska, in an application to the United States Land Office for a United States Patent for all of the land embraced within the exterior boundaries of the town of Haines, including all of the premises embraced within said survey 573 as a townsite under and by virtue of the laws of the United States applicable to the District of Alaska.

5. That the application of said Solomon Ripinsky for a United States Patent for said land embraced within said survey 573 is not made in good faith, for the reason that said Solomon Ripinsky has never actually occupied any of said premises, except two small parcels, one 25x150 feet in the southeasterly corner of said land and marked on applicant's plat Ripinsky House, which he acquired by purchase from one H. Fay, and the other 100x150 feet in the extreme eastern end of said land embraced in said survey and *mark* on applicant's plat Garden, which he occupies as a residence; that said Solomon Ripinsky filed a pretended location notice in the United States Commissioner's office at Skagway, in the District of Alaska, on July 17, 1903, claiming all of the lands

embraced in said survey 573 as a homestead, and at the time of filing said pretended location said Solomon Ripinsky well knew that all of said premises, excepting the small parcels heretofore described as occupied by himself, were actually occupied in good faith and in the possession of all of your adverse claimants, and that at the time of making said pretended location of said homestead claim said Solomon Ripinsky well knew that your adverse claimants had expended over forty thousand dollars in the construction of buildings and other improvements on said premises; that said Solomon Ripinsky is not in good faith in seeking United States patent for said premises for a homestead, but is endeavoring to procure patent to the same for speculative purposes.

6. That prior to the filing of said pretended location notice by said Ripinsky, claiming said land as a homestead, your adverse claimants had expended a sum of money exceeding $40,000.00 in the improvement of said premises by building residences, store buildings and other structures [7] on said premises and were at the time actually using and occupying said buildings as homes and store buildings; all of which was well known to the said Ripinsky at the time he filed for record in the United States Commissioner's office at Skagway, Alaska, his homestead notice claiming the land embraced in said homestead application, and that your adverse claimants have continued at all times since the initiation of their occupation in December, 1897, to occupy, improve and reside upon the premises described in said homestead application and said Survey 573; that the said

Ripinsky was in the town of Haines, Alaska, during all of the time when said improvements were being made and said buildings erected by your adverse claimants, and never notified or informed any of your adverse claimants in any manner that he laid any claim whatever to the premises on which they were making such improvements and never notified any of your adverse claimants that he intended to lay any claim whatever to any of the premises described in said homestead application and embraced within said Survey 573, except the two small parcels thereof which have been hereinbefore referred to.

WHEREFORE, your adverse claimants pray that no further action be taken in your office upon said application of said Solomon Ripinsky for a United States patent as a homestead for the lands embraced within said survey 573 and described in said application until the rights to said premises of your adverse claimants be determined in a court of competent jurisdiction within the District of Alaska.

KATE A. KABLER; S. J. WEITZMAN; JAMES A. NETTLES; JOHN G. MORRISON; IDA JOHNSON, by W. B. STOUT; E. J. BERGER, by W. B. STOUT; M. E. HANDY, by W. B. STOUT; FRED HANDY, by W. B. STOUT; B. A. MAHAN; H. FAY; ED. FAY; J. W. MARTIN; T. DRYDEN; M. V. McINTOSH; MARY V. McINTOSH; JESSE CRAIG; JAS. FAY; R. M. ODELL; G. W. HINCHMAN; [8] G. C. DE HAVEN; TIM CREEDON; TOM VALEUR;

TIM VOGEL; CAREN BJORNSTAD; CARL BJORNSTAD; A. J. DENNERLINE; ED. ADAMA; H. RAPPOLT; W. W. WARNE, by C. FORD; D. BUTTERICH; WM. HOLGATE; PETER JOHNSON, by S. J. WEITZMAN; V. READ.

United States of America,
District of Alaska,—ss.

I, S. J. Weitzman, being first duly sworn, on oath depose and say: I am a citizen of the United States and a resident of Haines, Alaska; I am one of the adverse claimants in the above-entitled matter; I have read the above adverse claim, know the contents thereof and the same is true.

S. J. WEITZMAN.

Subscribed and sworn to before me this 1st day of May, 1906.

[Seal] T. R. LYONS,
Notary Public for Alaska. [9]

United States of America,
District of Alaska,—ss.

I, Kate A. Kabler, being first duly sworn, on oath, say: That I am one of the plaintiffs in the above-entitled action; that I have read the foregoing complaint and know the contents thereof, and believe the same to be true.

KATE A. KABLER.

Subscribed and sworn to before me, this 2d day of July, A. D. 1906.

[Seal] JNO. R. WINN,
Notary Public, Alaska.

Due service of a copy of the within Complaint is admitted this 2 day of July, 1906.

R. W. JENNINGS,
JNO. R. WINN,
Attorneys for Dft.

[Endorsed]: No. 547–A. In the District Court, First Division, District of Alaska. G. W. Hinchman, Wm. Holgate et al., *Plaintiff,* vs. Sol. Ripinsky, Defendant. Original. Complaint. Filed Jul., 12, 1906. C. C. Page, Clerk. By D. C. Abrams, Deputy. Shackleford and Lyons, Attorneys for Plffs., Juneau, Alaska. [10]

[Summons.]

In the United States District Court for the District of Alaska, Division No. 1.

No. 547–A.

G. W. HINCHMAN, WILLIAM HOLGATE, JOHN G. MORRISON, J. A. NETTLES, CORTEZ FORD, TOM VALEUR, R. M. ODELL, D. BUTRICH, E. J. BERGER, IDA JOHNSON, M. E. HANDY, FRED HANDY, G. C. DE HAVEN, TIM CREEDON, BENJAMIN A. MAHAN, THOMAS DRYDEN, ED. FAY, JAMES FAY, H. FAY, W. W. WARNE, TIM VOGEL, C. BJORNSTAD, H. RAPPOLT, KAREN BJORNSTAD, M. V. McINTOSH, MARY V. McINTOSH, JESSIE CRAIG, E. A. ADAMS, J. W. MARTIN, A. J. DEN-

NERLINE, S. J. WEITZMAN, PETER JOHNSON and MRS. KATE KABLER, and V. READ.

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

To Solomon Ripinsky, Defendant, Greeting:

IN THE NAME OF THE UNITED STATES OF AMERICA: You are hereby commanded to be and appear in the above-entitled court, holden at Juneau, Alaska, in said Division of said District, and answer the complaint filed against you in the above-entitled action within thirty days from the date of the service of this summons and a copy of the said complaint upon you, and if you fail so to appear and answer, for want thereof the plaintiffs will apply to the Court for the relief demanded in said complaint, a copy of which is served herewith.

And you, the United States Marshal of Division No. 1, of the District of Alaska, or any deputy are hereby required to make service of this summons upon the said defendant as by law required, and you will make due return hereof to the Clerk of the Court within forty days from the date of delivery to you with an endorsement hereon of your doings in the premises.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of the above court this 2d day of July, A. D. 1906.

[Seal] C. C. PAGE,
Clerk.
By D. C. Abrams,
Deputy. **[11]**

Juneau.

Office of U. *U.* Marshal, Dist. of Alaska, Div. No. 1.
Jul. 3, 1906.

Recd. for Service.

JAMES M. SHOUP,
U. S. Marshal, District of Alaska, Division No. 1.
By J. B. Heyburn,
Deputy.

United States of America,
Dist. of Alaska, Divn. No. 1,—ss.

I hereby certify that I received the within summons on July 3, 1906, and served the same on July 5, 1906, at Haines, Alaska, by delivering a copy thereof, together with a copy of the complaint in said action, prepared and certified by L. P. Shackleford one of the Attys. for Plffs. herein, to the within named Deft. Solomon Ripinsky, personally and in person.

JAMES M. SHOUP,
United States Marshal.
By Hector McLean,
Deputy.

Dated Juneau, Alaska, June 6, 1906.
Marshal's Fees, $3#, pd. by plff.

[Endorsed]: No. 547–A. In the District Court, First Division, District of Alaska. G. W. Hinchman, Wm. Holgate et al., *Plaintiff,* vs. Solomon Ripinsky, Defendant. Original. Summons. Filed Jul. 6, 1906. C. C. Page, Clerk. By D. C. Abrams, Deputy. Shackleford and Lyons, Attorneys for plffs., Juneau, Alaska. [12]

[Order Directing Amendment of Complaint, and Denying Motion to Strike.]

In the District Court for Alaska, Division No. 1, at Juneau.

G. S. HENCHMAN et al.,

Plaintiffs,

vs.

SOL RAPINSKY,

Defendant.

ORDER ON MOTION TO MAKE MORE DEFINITE AND CERTAIN.

This cause came on to be heard on the 11th day of December, 1906, upon the motion of the defendant to require the plaintiffs to make their complaint more definite and certain and to strike out a portion of said complaint and was argued by counsel; that the Court having heard said argument and being fully advised in the premises, sustains the motion to make the complaint more definite and certain and denies the motion to strike.

It is therefore considered by the Court, and so ordered, adjudged and decreed, that the plaintiffs within thirty days amend their complaint so as to show whether or not the plaintiffs claim the prem-

ises in controversy jointly or in severalty and if they claim in severalty, set out the specific parcels of land claimed by each; and second, to set out specifically the portion of the premises they admit to be occupied by the defendants; to all of which plffs. except.

It is further ordered that the motion to strike out a portion of said complaint be, and the same is hereby, denied.

ROYAL A. GUNNISON,
Judge.

[Endorsed]: Original. No. 547–A. In the District Court, for the District of Alaska, Division No. 1, at Juneau. G. S. Henchman et al., *Plaintiff,* vs. Sol Rapinsky, Defendant. Order on Motion to Make More Definite and Certain. Filed Dec. 10, 1906. C. C. Page, Clerk. By J. E. Brooks, Deputy. Malony & Cobb, Attorneys for Defendant. Office: Juneau, Alaska. [13]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 547–A.

G. W. HINCHMAN et al.,
vs.
SOLOMON RIPINSKY.

Order [Extending Time to File Amended Complaint.]

Now, on this day, upon application of Shackleford & Lyons, attorneys for the *plaintiff* herein, it is hereby ordered that plaintiffs' time to file an

amended complaint herein be extended to February 25th, 1907.

Done in open court Wednesday, December 26th, 1906.

ROYAL A. GUNNISON,
Judge. [14]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. —— A.

G. W. HINCHMAN, WILLIAM HOLGATE, JOHN G. MORRISON, J. A. NETTLES, CORTEZ FORD, TOM VALEUR, R. M. ODELL, D. BUTRICH, E. J. BERGER, IDA JOHNSON, M. E. HANDY, FRED HANDY, G. C. DE HAVEN, TIM CREEDON, BENJAMIN A. MAHAN, THOMAS DRYDEN, ED. FAY, JAMES FAY, H. FAY, W. W. WARNE, THOMAS VOGEL, C. BJORNSTAD, H. RAPPOLT, KAREN BJORNSTAD, M. V. McINTOSH, MARY V. McINTOSH, JESSE CRAIG, E. A. ADAMS, J. W. MARTIN, A. J. DENNERLINE, S. J. WEITZMAN, PETER JOHNSON, MRS. KATE KABLER and READE,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Amended Complaint.

Come now the plaintiffs above named and file this their amended complaint herein, and complain of the defendant and allege:

I.

That the plaintiffs above named, and each of them, are citizens of the United States and residents and occupants of property in the town of Haines, in the District of Alaska, and residents of and in the occupancy of lands embraced in Survey No. 573, at Haines, Alaska, and that all of the land embraced in the said United States Survey No. 573, situated in the town of Haines, Alaska, is more particularly described as follows, to wit:

Beginning at Cor. No. 1, under Ripinsky's house, from which point U. S. L. M. No. —— bears S. 6° 45′ W., 2.64 chains distant, witness Cor. bears W. 30 links, a stone marked S. 573 W. C. 1; thence from true Cor. N. 14° 20′ E., along mean high-water mark of Portage [15] Cove, 2.30 chains to Cor. No. 2, not set, witness Cor. bears W. 30 links, a stone marked S. 573 W. C. 2; thence from true Cor. W. 9.10 chs. to Cor. No. 3, an iron pipe 3 inches in diam. marked S. 573 C. 3; thence N. 3.16 chs. to Cor. No. 4, a granite stone marked S. 573 C. 4; thence W. 31.27 chs. to Cor. No. 5, a stone marked S. 573 C. 5; thence S. 1.68 chs. to Cor. No. 6, a stone marked S. 573 C. 6; thence S. 80° 54′ E. along north line of Presbyterian Mission, 34.00 chs. to Cor. No. 7, an iron pipe marked S. 573 C. 7; thence N. 1.67 chs. to Cor. No. 8, an iron pipe marked S. 573 C. 8; thence E. 6.23 chs. to Cor. No. 1, the place of beginning. Magnetic variation at all corners 28° 30′ east; containing 15.40 acres, is within the exterior boundaries of the town of Haines, in the District of Alaska.

II.

That all of said lands embraced in said Survey No. 573 have been ever since December, 1897, and now are, settled upon and occupied as a townsite and are not subject to entry under agricultural pre-emption laws or otherwise than under the laws of the United States applicable to public lands settled upon and occupied as a townsite, and that the plaintiffs now are and have been ever since December, 1897, in possession and occupation in good faith of all the lands embraced in said Survey No. 573, hereinbefore described; that all of said lands embraced in said Survey No. 573 constitute the principal business section of the town of Haines, Alaska, and that the plaintiffs are occupying in good faith and have at all times been occupying in good faith, said lands since the said month of December, 1897, for business and residential purposes; and that these plaintiffs have constructed buildings, such as stores, hotels, residences, etc., in value exceeding the sum of $50,000.00; and annexed hereto and marked Exhibit "B" is a map of the portion of the townsite of Haines, Alaska, included within the exterior boundaries of the said United States Survey No. 573, and the plaintiffs herein claim that certain street 50 feet wide, and [16] shown on said map and known as Main Street, and those certain streets shown on said map 75 feet wide and known as Second Avenue, Third Avenue, Fourth Avenue, Fifth Avenue and Sixth Avenue, respectively, and, also, that portion of Dalton Street as shown within the exterior boundaries of said Ripinsky Homestead Survey, as public

streets and rights of way, and, also claim that certain alley-way running between Dalton and Main streets, and shown on said map, and being 20 feet wide, as a public right of way or alley, which said streets and alleys are claimed in common by all of the plaintiffs and by all of the residents of Haines, Alaska; that the remainder of the ground so set forth in said map and marked thereon by metes and bounds and by numbered parcels is claimed in severalty by the various plaintiffs, respectively, as on said map shown and indicated as follows, to wit:

Block 1: Parcel 1, J. G. Morrison; parcel 2, Nettles & Ford; parcel 3, S. J. Weitzman; parcel 4, H. Fay; parcel 5, Sol. Ripinsky; parcel 6, J. W. Martin; parcel 7, B. A. Mahan; parcel 8, M. V. McIntosh; parcel 9, J. W. Martin; parcel 10, James Fay; parcel 11, D. Butrich; parcel 12, R. L. Weitzman; parcel 13, R. L. Weitzman; parcel 14, E. A. Adams; parcel 15, Fred Handy; parcel 16, J. G. Morrison; parcel 17, G. C. Dehaven & Tim Creedon.

Block 2: Parcel 1, Thomas Vogel; parcel 2, T. D. Valeur; parcel 3, Jim Fay; parcel 4, Ida Johnson; parcel 5, S. J. Weitzman; parcel 6, M. E. Handy; parcel 7, W. W. Warne; parcel 8, W. W. Warne; parcel 9, W. W. Warne; parcel 10, W. W. Warne, parcel 11, W. W. Warne; parcel 12, Karen Bjornstad, parcel 13, Karen Bjornstad; parcel 14, Karen Bjornstad;

Block 3: parcel 1, Mary V. McIntosh; parcel 2, Wm. Bryson; parcel 3, H. Fay; parcel 4, E. J. Berger; parcel 5, Karen Bjornstad; parcel 6, Henry Rappolt; parcel 7, Geo. Hinchman; parcel 8, Geo.

Hinchman; parcel 9, C. Bjornstad; parcel 10, H. Conger; parcel 11, Wm. Holgate; parcel 12, Wm. Holgate.

Block 4: parcel 1, Kate Kabler; parcel 3, H. Fay; parcel 4, [17] Pete Johnson; parcel 5, Pete Johnson; parcel 6, Pete Johnson.

Block 5: parcel 1, A. J. Dennerline; parcel 2, M. E. Handy; parcel 3, Ed. Fay; parcel 4, John Paddock; parcel 5, Thomas Dryden; parcel 6, Mrs. Jesse Craig.

Block 6: Parcel 1, Jo. Stubbler; parcel 2, A. J. Dennerline.

III.

That these plaintiffs have applied to the proper officers in the United States Land Office for a survey of said lands embraced within said Survey No. 573 for the purpose of entering the same as a townsite under the laws of the United States, in such cases made and provided, including all of the lands embraced within the exterior boundaries of the town of Haines, Alaska, and that it is the intention of the plaintiffs and the occupants of the said town of Haines to apply for a United States patent to the lands embraced in said townsite and in said Survey No. 573.

IV.

That the defendant, Solomon Ripinsky, claims an interest and estate in and to the said lands embraced within the said Survey No. 573 adverse to these plaintiffs.

V.

That the said defendant, Solomon Ripinsky, has

never occupied any of the said lands within the said Survey No. 573 except two small parcels, one 25x50 feet, which he acquired by purchase from one H. Fay, and another 100x150 feet, which he occupies as a residence.

VI.

That on the 17th day of July, 1903, the said Solomon Ripinsky filed, or caused to be filed, a pretended location notice in the United States Commissioner's office at Skagway, in the District of Alaska, attempting to, and claiming to, locate all of the lands embraced within the exterior boundaries of the U. S. Survey No. 573 as a homestead; [18] that at the time of filing said pretended location notice, all of the said lands embraced within the said location notice and within the said Survey No. 573 were occupied by the residents and citizens of the town of Haines, Alaska, and these plaintiffs have certain townsite holdings within the town of Haines, and that none of said lands were held by the said Solomon Ripinsky as a homestead, and in truth and in fact, none of said lands were occupied by said Solomon Ripinsky save and except the two parcels herein described; that the location by the said Solomon Ripinsky of said lands was not in good faith, and that said Solomon Ripinsky well knew that the said lands were not subject to location for homestead purposes.

VII.

That on or about the 2d day of March, 1906, the said Solomon Ripinsky filed in the United States Land Office at Juneau, Alaska, his application for a patent to the lands embraced within said U. S. Sur-

vey No. 573; that thereafter a notice was issued and published by the Register and Receiver of the United States Land Office at Juneau, Alaska, of the application of the said defendant for the lands embraced in the said Survey No. 573; that within thirty days after the period of publication of said notice, the plaintiffs herein duly filed in the United States Land Office at Juneau, Alaska, their notice of adverse claim, a copy of which is annexed hereto and marked Exhibit "A."

WHEREFORE, the plaintiffs pray that decree be entered herein adjudging and decreeing:

1. That the said property included within the exterior boundaries of Survey No. 573 is not subject to application for patent on the part of the defendant herein and is not, and was not, subject to location as a homestead.

2. That the plaintiffs herein be adjudged and decreed to be entitled to the lands embraced in the said U. S. Survey No. 573 as against the defendant, save and except the two parcels of lands herein [19] mentioned which are in the actual occupation of the said defendant.

3. That the defendant be perpetually enjoined from proceeding with his said application for patent under the homestead laws, and that the title of the plaintiffs herein and their right to the possession and occupation of the lands described in the said Survey No. 573, save and except the two parcels of land hereinbefore mentioned, be determined to be paramount to the claim of the defendant herein; and that any claim, interest or estate which the de-

fendant may set forth to the said property be forever quieted in favor of these plaintiffs.

4. For plaintiffs' costs and disbursements herein laid out and expended, and for such other and further relief as to the Court may seem meet and proper.

_____,

Attorneys for Plaintiffs. [20]

Exhibit "A" [to Amended Complaint].

IN THE UNITED STATES LAND OFFICE AT JUNEAU, ALASKA.

In the Matter of the Application for Patent for Homestead Claim by SOLOMON RIPINSKY.

G. W. HINCHMAN, WILLIAM HOLGATE, JOHN G. MORRISON, JAMES A. NETTLES, CORTEZ FORD, TOM VALEUR, R. M. ODELL, D. BUTRICH, E. J. BERGER, IDA JOHNSON, M. E. HANDY, FRED HANDY, G. C. DE HAVEN, TIM CREEDON, BENJAMIN A. MAHAN, THOMAS DRYDEN, ED. FAY, JAMES FAY, H. FAY, W. W. WARNE, TIM VOGEL, C. BJORNSTAD, H. RAPPOLT, CAREN BJORNSTAD, M. V. McINTOSH, MARY V. McINTOSH, JESSIE CRAIG, E. A. ADAMS, J. W. MARTIN, A. J. DENNERLINE, S. J. WEITZMAN, PETER JOHNSON, MRS. KATE KABLER and V. READ,

Adverse Claimants.

Adverse Claim.

To the Honorable Register and Receiver of the United States Land Office at Juneau, Alaska:

Your adverse claimants, G. W. Hinchman, William Holgate, John G. Morrison, James A. Nettles, Cortez Ford, Tom Valeur, R. M. Odell, D. Butrich, E. J. Berger, Ida Johnson, M. E. Handy, Fred Handy, G. C. Dehaven, Tim Creedon, Benjamin A. Mahan, Thomas Dryden, Ed. Fay, James Fay, H. Fay, W. W. Warne, Tim Vogel, C. Bjornstad, H. Rappolt, Caren Bjornstad, M. V. McIntosh, Jessie Craig, Mary V. McIntosh, E. A. Adams, J. W. Martin, A. J. Dennerline, S. J. Weitzman, Peter Johnson, Mrs. Kate A. Kabler and V. Read, to the application for patent for homestead claim for land embraced in Survey No. 573, at Haines, Alaska, respectfully show: [21]

1. That all of your adverse claimants are citizens of the United States and residents of the town of Haines, Alaska.

2. That all of the land embraced in said United States Survey No. 573, for which Solomon Ripinsky has applied to your office for patent as a homestead and which land is more particularly described as follows, to wit:

Beginning at a cor. No. 1, under Ripinsky's house, from which point U. S. L. M. No. —— bears S. 6° 45′ W., 2.64 chains distant, witness cor., bears W. 30 links, a stone marked S. S. 573 W. C. 1; thence from true cor. N. 14° 20′ E., along mean high-water mark of Portage Cove, 2.30 chns. to cor. No. 2, not set,

witness cor. bears W. 30 lks., a stone marked S. 573 W. C. 2; thence from true cor. west 9.10 chs. to cor. No. 3, an iron pipe 3 inches in diam. marked S. 573 C. 3; thence N. 3.16 chs. to cor. No. 4, a granite stone marked S. 573 C. 4; thence W. 31.27 chs. to cor. No. 5, a stone marked S. 573 C. 5; thence S. 1.68 chs. to cor. No. 6, a stone marked S. 573 C. 6; thence S. 80° 54′ E. along north line of Presbyterian Mission, 34.00 chs. to cor. No. 7, an iron pipe marked S. 573 C. 7; thence N. 1.67 chs. to cor. No. 8, an iron pipe marked S. 573 C. 8; thence E. 6.23 chs. to cor. No. 1, the place of beginning. Magnetic variation at all corners 28° 30′ east; containing 15.4 acres, is without the exterior boundaries of the town of Haines, in the District of Alaska.

3. That all of your adverse claimants are *bona fide* residents of said town of Haines, Alaska, and are now, and have been, at all times since December, 1897, in possession and occupation, in good faith, of all the land embraced within said Survey No. 573 and hereinbefore described; that all of said land embraced in said survey, and hereinbefore described, constitutes the principal business section of the town of Haines, Alaska, and that your adverse claimants are occupying in good faith and have been at all times occupying said land in good faith since December, 1897, for business and residential purposes; that your adverse claimants have constructed buildings, such as hotel structures for business purposes, residences, etc., in value exceeding the sum of $50,000.00.

4. That it is the intention of your adverse claimants to join all of the citizens of the town of Haines,

Alaska, in an application to the United States Land Office for a United States Patent for all of the [22] land embraced within the exterior boundaries of the town of Haines, including all of the premises embraced within said Survey 573 as a townsite under and by virtue of the laws of the United States applicable to the District of Alaska.

5. That the application of said Solomon Ripinsky for a United States Patent for said land embraced within said Survey 573 is not made in good faith, for the reason that said Solomon Ripinsky has never actually occupied any of said premises, except two small parcels, one 25x150 feet, in the southeasterly corner of said land and marked on applicant's plat Ripinsky house, which he acquired by purchase from one H. Fay, and the other 100x150 feet, in the extreme eastern end of said land embraced in said survey and marked in applicant's plat Garden, which he occupies as a residence; that said Solomon Ripinsky filed a pretended location notice in the United States Commissioner's office at Skagway, in the District of Alaska, on July 17, 1903, claiming all of the lands embraced in said Survey 573 as a homestead and at the time of filing said pretended location said Solomon Ripinsky well knew that all of said premises, excepting the small parcels heretofore described as occupied by himself, were actually occupied in good faith and in the possession of all of your adverse claimants, and that at the time of making said pretended location of said homestead claim said Solomon Ripinsky well knew that your adverse claimants had expended over forty thousand dollars

in the construction of buildings and other improvements on said premises; that said Solomon Ripinsky is not in good faith in seeking United States patent for said premises for a homestead, but is endeavoring to procure patent to the same for speculative purposes.

6. That prior to the filing of said pretended location notice by said Ripinsky, claiming said land as a homestead, your adverse claimants had expended a sum of money exceeding $40,000.00 in the improvement of said premises by building residences, store buildings, [23] and other structures on said premises, and were at the time actually using and occupying said buildings as homes and store buildings; all of which was well known to the said Ripinsky at the time he filed for record in the United States Commissioner's office at Skagway, Alaska, his homestead notice claiming the land embraced in said homestead application, and that your adverse claimants have continued at all times since the initiation of their occupation in December, 1897, to occupy, improve and reside upon the premises described in said homestead application and said Survey 573; that the said Ripinsky was in the town of Haines, Alaska, during all of the time when said improvements were being made and said buildings erected by your adverse claimants and never notified or informed any of your adverse claimants in any manner that he laid any claim whatever to the premises on which they were making such improvements, and never notified any of your adverse claimants that he intended to lay any claim whatever to any of the premises described in said

homestead application and embraced within said Survey 573, except the two small parcels thereof which have been hereinbefore referred to.

WHEREFORE, your adverse claimants pray that no further action be taken in your office upon said application of said Solomon Ripinsky for a United States patent as a homestead for the lands embraced within said Survey 573 and described in said application until the rights to said premises of your adverse claimants be determined in a court of competent jurisdiction within the District of Alaska.

KATE A. KABLER; S. J. WEITZMAN; CORTEZ FORD; JAMES A. NETTLES; JOHN G. MORRISON; IDA JOHNSON, by W. B. STOUT; E. J. BERGER, by W. B. STOUT; M. E. HANDY, by W. B. STOUT; FRED HANDY, by W. B. STOUT; B. A. MAHAN; H. FAY; ED. FAY; J. W. MARTIN; T. DRYDEN; [24] M. V. McINTOSH; MARY V. McINTOSH; JESSIE CRAIG; JAS. FAY; R. M. ODELL; G. W. HINCHMAN; G. C. DE HAVEN; TIM CREEDON; TOM VALEUR; TIM VOGEL; C. BJORNSTAD; CAREN BJORNSTAD; A. J. DENNERLINE; E. A. ADAMS; H. RAPPOLT; W. W. WARNE, by C. FORD; D. BUTTERICK; WM. HOLGATE; PETER JOHNSON, by S. J. WEITZMAN; V. READ.

United States of America,
District of Alaska,—ss.

I, S. J. Weitzman, being first duly sworn, on oath,

depose and say: I am a citizen of the United States and a resident of Haines, Alaska; I am one of the adverse claimants in the above-entitled matter; I have read the above adverse claim, know the contents thereof and the same is true.

S. J. WEITZMAN.

Subscribed and sworn to before me this 1st day of May, 1906.

[Seal] T. R. LYONS,
Notary Public for Alaska. [25]

United States of America,
District of Alaska,—ss.

I, S. J. Weitzman, being first duly sworn, on oath say: That I am one of the plaintiffs in the above-entitled action; that I have read the foregoing Amended Complaint and exhibits and know the contents thereof and believe the same to be true.

S. J. WEITZMAN.

Subscribed and sworn to before me this 25th day of March, A. D. 1907.

[Seal] W. B. STOUT,
Notary Public for Alaska.

Due service of a copy of the within is admitted this 28 day of March, 1907.

R. W. JENNINGS,
Attorneys for Defendant.

[Endorsed]: Original No.547–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., Plaintiffs, vs. Solomon Ripinsky, Defendant. Amended Complaint. Filed Mar. 28, 1907. C. C. Page, Clerk.

By A. W. Fox, Deputy. Shackleford & Lyons, Attorneys for Plaintiffs. Office: Juneau, Alaska. [26]

[Order Granting Motion to Strike Certain Portions of Amended Complaint Allowing Filing of Second Amended Complaint, etc.]

In the District Court for the District of Alaska, Div. No. 1.

G. W. HINCHMAN et al.,

vs.

SOLOMON RIPINSKY.

Now on this day this cause coming on to be heard on motion of defendant to strike certain portions of plaintiffs' Amended Complaint, and after argument by counsel for both plaintiffs and defendant and the Court being fully advised grants said motion, to which ruling of the Court plaintiffs except, and plaintiffs are hereby given five days within which to file another Amended Complaint, and are permitted to detach the map attached to the Amended Complaint herein and attach the same to the Second Amended Complaint to be hereafter filed.

Dated this 7th day of May, 1907.

JAMES WICKERSHAM,
District Judge.

O. K.—R. W. JENNINGS.

[Endorsed]: 547–A. In the Dist. Court for the Dist. of Alaska, Div. No. 1. G. W. Hinchman et al., vs. Solomon Ripinsky. Filed May 7, 1907. C. C. Page, Clerk. By E. W. Pettit, Asst. [27]

[Defendant's Exhibit No. 7.]

Chilkat Alaska December 2d 1897.

Know all men by these presents that I, Sarah Dickinson of Chilkat Alaska, in consideration of 200/00 two hundred dollars. To me in hand paid by Sol Ripinsky of Chilkat Alaska the receipt whereof is hereby acknowledged do hereby bargain sell and transfer into the said Sol Ripinsky both Buildings and all the land adjoining the Presbyterian Mission grounds, situate at Haines Mission Alaska. Except one acre of land claimd by Mrs. J. Dalton. All the above property was left to me by my deceased husband George Dickinson & was known as the Dickinson property which I will defend against all claimes. [*]

Signed,

S. DICKINSON.

In the presence of

F. A. ROYERS.

G. A. BALDWIN.

Be it known that on the second day of December One thousand eight hundred and ninety seven, Mrs. Sarah Dickinson of Chilkat Alaska, personally ap-

---

[*Written in margin:] Adjoining the Mission grounds on the south & the Indian Village on the north.

peard and makes oath that the following statement by her subscribed is true.

Signd

S. DICKINSON.

In the presence of

F. A. ROYERS.

G. A. BALDWIN.

Before me

[Seal] SOL RIPINSKY,

Notary Public, District of Alaska.

[Written on Face of Instrument:]

Filed for Record Dec. 15, /97 & Recorded Book 1 of Deeds at page 31. John M. Smith, U. S. Commissioner.

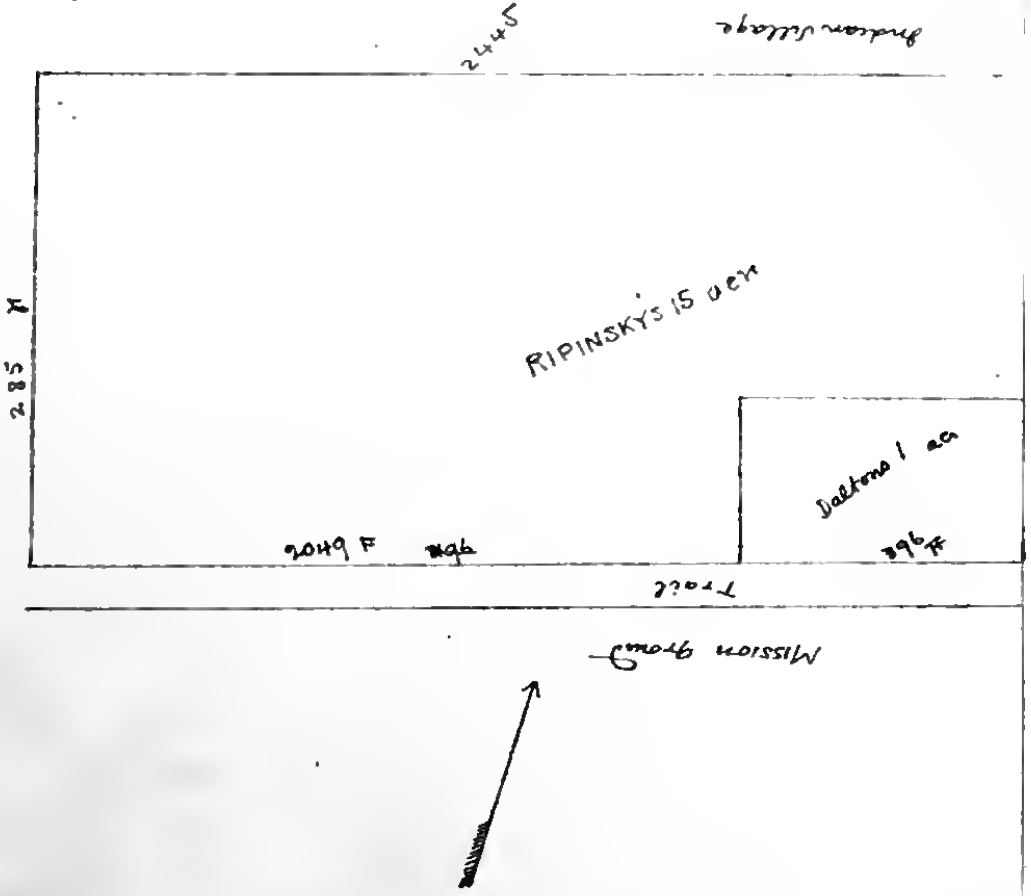
Filed for Record this 15 day of December, 1897, at 10 P. M. John M. Smith, U. S. Commissioner for the District of Alaska, at Dyea. Recorded Book 1 of Deeds, Page 32. Defendant's Ex. No. 7. Cause No. 547–A. L. R. Gillette, Referee. [28]

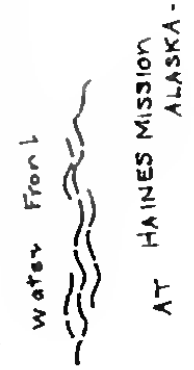
[Endorsed on Reverse of Instrument:]

E. a.

R v L

R v L
(Pltf's Ex "A")
N.E.M.





Defendants Exhibit No 7 (Seven) for Identification - Jan 2
Cause No 547-
L R Gillette
Referee

In Evidence as above
Defts Exhibit
No 7
L R Gillette
Referee

Pltf-
Ex. A.

DISTRICT OF ALASKA } ss.
Juneau.
The within instrument was filed for record at 2 o'clock P. M. Jan. 21. 1899, and duly recorded in book ..... on page ..... of the records of said District.

..... District Recorder.

DISTRICT OF ALASKA } ss
Juneau
The within instrument was filed for record at 2 o'clock M. Jany 28th 1899 and duly recorded in book 14 Deeds on page 5 of the records of said District.

Norman E. Mallott
District Recorder.

In the District Court for the District of Alaska, Division No 1, at Juneau.

No. 547–A.

GEORGE W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Findings of Fact and Conclusions of Law.

On this day, this cause coming on to be heard on the testimony heretofore taken by the Referee in this Cause, the opinion and decision of the Court heretofore rendered herein on the 10th day of July, 1908, the decision of the Court of Appeals on appeal therefrom and the amendment of said latter decision by said Court of Appeals, upon the petition for rehearing filed March 9, 1911, in said court, upon the decree and mandate of that court, the pleadings of the parties as thereafter amended and the further evidence taken in the above-entitled court, and the Court being now fully advised in the premises makes and enters herein its Findings of Fact as follows, to wit:

1.

That all of the parties herein named except D. Butrich, E. J. Berger, Thomas Dryden, Peter Johnson, V. Reade and H. Rappolt are citizens of the United States and all of the plaintiffs were at the time of the commencement of this action, and have been for a long time prior thereto, residents of the town of Haines, and were at said time and for a long time

prior thereto in possession [29] and occupation of substantially all of that portion of Survey No. 573 at Haines, Alaska, included in Blocks 1, 2, 3, 4, 5 and 6 of the town of Haines as surveyed and platted by Walter Fogelstrom, and were at all such times in possession of and using as streets and alleys the streets and alleys platted therein by him, except Lot 5 of Block 1 of said plat, which said survey No. 573 is more particularly described as follows:

Beginning at Cor. No. 1, under Ripinsky's house, from which point U. S. L. M. No. —— bears S. 6° 45′ W., 2.64 chains distant, witness cor., bears W. 30 links, a stone marked S. 573 W. C. 1; thence from true cor. N. 14° 20′ E., along mean high-water mark of Portage Cove, 2.30 chains to cor. No. 2, not set, witness cor. bears W. 30 links, a stone marked S. 573 W. C. 2; thence from true Cor. W. 9.10 chains to Cor. No. 3, an iron pipe 3 inches in dia. marked S. 573 C. 3; thence N. 3.16 chains to Cor. No. 4, a granite stone marked S. 573, C. 4; thence W. 31.27 chs. to Cor. No. 5, a stone marked S. 573 C. 5; thence S. 168 chs. to Cor. No. 6, a stone marked S. 573 C. 6; thence S. 80° 54′ along north line of Presbyterian Mission 34.00 chs. to Cor. No. 7, an iron pipe marked S. 573 C. 7; thence N. 1.67 chs. to cor. No. 8, an iron pipe marked S. 573, C. 8; thence E. 6.23 chs. to Cor. No. 1 the place of beginning. Magnetic variation at all corners 28° 30′ east; containing 15.40 acres, is within the exterior boundaries of the town of Haines, in the District of Alaska.

That neither the plaintiffs, nor anyone in their behalf, has ever made an entry of said lands or any

part thereof for townsite purposes.

2.

That the defendant acquired no right, title or interest in or to any of the premises within said Survey No. 573 described in paragraph 1 of these Findings by virtue of the alleged deed, dated December 2, 1897, and signed S. Dickinson; and that the defendant acquired no right, title, interest, possession or right of possession in or to any of the lands included in said survey described in paragraph 1 of these Findings by virtue of the Homestead Location Notice which he filed at the recording office at Skagway, Alaska, on the 23d day of June, 1903, and the defendant acquired no right, title, interest, possession or right [30] of possession in or to said premises by virtue of the Amended Location which he filed in the recording office at Skagway, Alaska, on the 18th day of December, 1905, and that the said defendant never has had any right, title or interest in or to any of said premises or survey except two small parcels hereinafter described, one of which obtained by purchase and the other by actual occupation.

3.

That substantially all of the lands embraced within that portion of Survey No. 573 platted by said surveyor, Walter Fogelstorm, as the town of Haines and described in paragraph 1 of these Findings, except said Lot 5 Block 1, were at the commencement of this action and have been ever since and prior to June 23, 1903, in the actual, notorious and exclusive possession and occupation in good faith of the plaintiffs herein, their grantors and predecessors in

interest, which said lands constitute the principal business section of the town of Haines, Alaska; and that the plaintiffs were at the time of the commencement of this action and have been at all times since the 23d day of June, 1903, occupying said lands in good faith for business and residential purposes; that these plaintiffs and their grantors and predecessors in interest have constructed buildings, such as stores, hotels and residences, on said platted portion of said land, in value exceeding the sum of $50,000; that the larger portion of said land embraced in said platted portion of said Survey No. 573 has been since June 23, 1903, and prior thereto occupied by the plaintiffs, their grantors and predecessors in interest, in severalty and that the remaining portions, except said Lot 5, Block 1, were occupied and used by the plaintiffs, their grantors and predecessors in interest, at the time of [31] the commencement of this action and at all times since the 23d day of June, 1903, and prior thereto, as streets, alleys and thoroughfares.

4.

That the defendant has no right, title or interest in or to any of the said lands included within Survey 573 at the time of the commencement of this action and never had any right, title, interest or possession in or to said lands, except two small tracts, one 20 feet wide by 50 feet long, known and described as Lot 5, Block 1 in said town of Haines and another small tract of land 100 feet wide by 150 feet long, which last parcel of land said defendant occupies as a residence, and which is in the extreme easterly end of survey 573, and is used by said defendant as a

residence, store and garden, and said *land* mentioned tract of land of said defendant is east of said Block 1 in the town of Haines, Alaska; that said two tracts of land, described are included within the lines embraced in said Survey 573 and were owned and occupied by the defendant at the time of the commencement of this action, but said two tracts of land are the only portions of said land embraced in Survey No. 573, which were owned and occupied by the defendant at the time of the commencement of this action, or were ever owned, possessed or occupied by said defendant.

5.

That on or about the 2d day of March, 1906, the defendant Solomon Ripinsky, filed in the United States Land Office at Juneay, Alaska, his application for a patent to the lands embraced within said U. S. Survey 573; that thereafter a notice was issued and published with the Register and Receiver of the United States Land Office at Juneau, Alaska, for the application of the said defendant for the lands embraced in the said Survey No. 573; [32] that within thirty days after the period of publication of said notice the plaintiffs above named duly filed in the U. S. Land Office at Juneau, Alaska, their notice of adverse claim, and that this suit was duly begun under and in support of said adverse claim.

To all of which the defendant excepts and the exception is allowed. Done in open court this 29th day of May, 1911.

EDWARD E. CUSHMAN,
Judge. [33]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

547–A.

GEORGE W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Conclusions of Law.

The Court having heretofore made and entered its Findings of Fact herein, now makes and enters its Conclusions of Law based upon such findings of fact:

1.

That the mere occupation of the lands described in the Findings of Fact by the plaintiffs, their grantors and predecessors in interest, without entry of said lands or any portion thereof for townsite purposes, does not constitute sufficient title or right upon which to entitle them to maintain this suit to quiet title or remove any cloud thereon, by reason of the defendant's assertion and claim thereto or otherwise.

2.

That the defendant is the owner and entitled to have his title thereto quieted against the plaintiffs to those two small tracts of land described in paragrapg 4 of the foregoing findings.

3.

That the defendant is entitled to judgment for costs.

Decree will be entered in accordance with the foregoing Findings of Fact and Conclusions of Law.

Done in open court this 29th day of May, 1911.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: No. 547–A. In the District Court of the United States, for the District of Alaska, Div. No. 1. G. W. Hinchman et al. vs. Sol. Ripinsky. Findings of Fact and Conclusions of Law. Filed May 29, 1911. E. W. Pettit, Clerk. By ————, Deputy. [34]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 547–A.

GEORGE W. HINCHMAN et al.,
Plaintiffs,

vs.

SOLOMON RIPINSKY,
Defendant.

Decree.

This cause having come on regularly to be heard before the Court and the Court having heretofore made and filed the findings of fact and conclusions of law herein:

IT IS CONSIDERED by the Court, and so ordered, adjudged and decreed, that the plaintiffs take nothing by their bill of complaint herein and the same is hereby dismissed on the merits.

IT IS FURTHER CONSIDERED by the Court, and so ordered, adjudged and decreed, that the de-

fendant, Solomon Ripinsky, is the owner of the following described parcels of land in Survey No. 573, bounded as follows:

A tract or parcel on the extreme east end of said survey No. 573, 100x150 feet in area, and parcel No. 5 in Block No. 1, according to the plat made by Walter Fogelstrom, as shown on Exhibit No. 1 attached to the Third Amended Complaint herein, which parcels are disclaimed by plaintiffs, and that he has no interest or right in the remainder of said lands, included in said Survey No. 573.

IT IS FURTHER ORDERED, adjudged and decreed that the defendant, Solomon Ripinsky, do have and recover of and from the above-named plaintiffs, G. W. Hinchman, William Holgate, John G. Morrison, J. A. Nettles, Cortez Ford, Tom Valeur, R. M. Odell, D. Butrich, E. J. Berger, Ida Johnson, M. E. Handy, Fred Handy, G. C. [35] De Haven, Tim Creedon, Benjamin A. Mahan, Thomas Dryden, Ed. Fay, James Fay, H. Fay, W. W. Warne, Thomas Vogel, C. Bjornstad, H. Rappolt, Karen Bjornstad, M. V. McIntosh, Mary V. McIntosh, Jesse Craig, E. A. Adams, J. W. Martin, A. J. Dennerline, S. J. Weitzman, Peter Johnson, Mrs. Kate Kabler and V. Reade, and each of them, jointly and severally, the costs and disbursements in this cause laid out and incurred, taxed at the sum of $ ———, for which let execution issue.

Dated this 29th day of May, 1911.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: In the District Court of the United States for the Div. No. 1 of Alaska. Hinchman et al. vs. Sol. Ripinsky. Filed May 29, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. [36]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 547–A.

GEORGE W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Plaintiffs' Exceptions to Findings of Fact and Conclusions of Law and Proposed Additional Findings of Fact and Conclusions of Law.

Plaintiffs except, first, to that portion of the Findings herein which purports to exclude E. J. Berger, D. Butrich, Thomas Dryden, Peter Johnson, V. Reade, and H. Rappolt from the benefit of said finding, for the reason that the same were occupants of the town of Haines on and prior to the 23d day of June, 1903; and further requests that the Court make the following additional Findings, to wit: That the inhabitants of the town of Haines made an application to the United States Surveyor General for the District of Alaska for the initiation of a townsite patent by asking for a survey of the exterior boundaries of the townsite of Haines, which said application was suspended pending the Ripinsky application, in

words and figures, as follows, to wit: (Counsel here requests the Court to incorporate a copy of Plaintiffs' Exhibit "A," on the second hearing.)

The plaintiffs except to that portion of Finding three, which finds that the land embraced in the platted portion of Survey 573 has been held by plaintiffs, their grantors and predecessors, in *severalty,* for the reason that the same is a conclusion of law and is contrary to the law in that the said townsite lands, before entry [37] through townsite trustee, are held by the occupants thereof jointly and in common and not in severalty. And the plaintiffs further request the Court to find as a conclusion of law that having been occupants of said townsite lands on and prior to the homestead entry of the defendant herein, the plaintiffs are entitled to a decree adjudging them to be entitled to the property described in the plaintiffs' complaint and prayed for as against the defendant herein and are entitled to all the benefits of townsite claimants including the entry of said lands, as townsite lands under the laws of the United States applicable to Alaska, and that the defendant be adjudged to have no title to said lands as against the plaintiffs herein.

SHACKLEFORD & BAYLESS,
Attorneys for Plaintiffs.

Exception allowed this 29th day May, 1911.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: No. 547-A. In the District Court of the United States for the Div. No. 1 of Alaska.

Hinchman et al. vs. Solomon Ripinsky. Exceptions to Findings and Conclusions of Law, etc. Filed May 29, 1911. E. W. Pettit, Clerk. By ————, Deputy. [38]

[Bill of Exceptions.]

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

No. 547-A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Be it remembered, that the above-entitled cause came on duly and regularly to be heard, upon rehearing, before the Honorable EDWARD E. CUSHMAN, Judge of said court, on Tuesday, the 16th day of May, 1911;

The plaintiffs herein being represented by Lewis P. Shackleford, Esq.;

The defendant being represented by John H. Cobb, Esq.:

Whereupon a statement of the case was made to the Court by the respective attorneys and the following additional proceedings had: [39]

Mr. SHACKLEFORD.—On this, the second trial of this cause, we ask the Court to take judicial notice of the printed record in the United States Circuit Court of Appeals for the Ninth Circuit in

case Number 1782, pages 1 to 929, inclusive, being the case of Solomon Ripinsky, appellant, versus G. W. Hinchman et al., appellees, and being the identical case now on trial before the court.

By the COURT.—The record contains all the evidence admitted on the original trial?

Mr. SHACKLEFORD.—Yes, sir.

By the COURT.—It will be so ordered.

Mr. SHACKLEFORD.—We also ask the Court to take judicial notice of the opinion on the petition for rehearing, filed in the United States Circuit Court of Appeals March 9, 1911; and also the previous opinion rendered upon appeal filed October 3, 1910, and reported in the 181 Federal at page 786.

By the COURT.—It will be so ordered.

Mr. SHACKLEFORD.—We also ask the Court to take judicial notice of the original complaint in Cause #547–A, being this case, filed on July 2, 1906; summons issued on July 2, 1906; order on motion, signed Royal A. Gunnison, Judge, to make more definite and certain, filed December 10, 1906; order extending time to file amended complaint, signed Royal A. Gunnison, Judge, dated December 26, 1906; amended complaint filed March 28, 1907; order signed James Wickersham, Judge, filed May 7, 1907, striking the portions of plaintiffs' complaint referring to proceedings in the Land Office, on motion of the defendant, and containing the exceptions of the plaintiff thereto; second amended complaint—it is [40] already in the record. The proceedings just referred to do not appear in the printed record and are therefore offered for the judicial notice of the Court at this time for the purpose of showing

that the form of the complaint was not voluntarily changed but changed under orders of the Court, to which we excepted.

By the COURT.—This is an offer of evidence, is it?

By Mr. SHACKLEFORD.—I do not think they are evidence. I want them before the court, though, so they will be a part of the Bill of Exceptions the next time.

By the COURT.—You may make your offer as regards the Mandate and Judgment on Mandate. You will take that up by supplemental record.

Mr. SHACKLEFORD.—I will also offer the Mandate of the Circuit Court of Appeals and the Judgment on the Mandate, coupled with the statement that we shall move at the proper time during the proceedings to retax costs adjudged under the mandate and under the judgment on the mandate.

By the COURT.—It will be admitted and considered, together with the filing marks on the mandate.

Mr. SHACKLEFORD.—Judge Lyons was the attorney who conducted this case and I am not entirely familiar with the record myself. It has suggested itself to me, in order to get a clear understanding of the case, it will probably be to our advantage to read the testimony. I want to consult the Court's convenience about time, but I am perfectly willing to read the plaintiffs' testimony.

By the COURT.—You will be controlled by your own judgment as to what is best in the matter.

(Whereupon Mr. Shackleford read the testimony on behalf of the plaintiffs in the previous case and which is found in [41] the printed record in the

United States Circuit Court of Appeals for the Ninth Circuit, in Case Number 1782, being the case of Solomon Ripinsky, Appellant, versus G. W. Hinchman et al., Appellees.

Mr. SHACKLEFORD.—The plaintiffs offer in evidence for the inspection of the Court the original deed, being defendant's Exhibit #7, for the purpose of demonstrating the method of interlineation on the margin of the deed and the manner in which the same was drawn and executed; and the plaintiffs also object to all oral testimony herein concerning the conveyance of the original trading site, or the purchase of the original trading site from the Northwest Trading Company, to Dickinson as being incompetent, irrelevant and immaterial and not the best evidence and as hearsay. And we also object to and move to strike all testimony concerning alleged conversations between the defendant herein, Ripinsky and the Dickinsons as to the acquisition of the said title from the Northwest Trading Co., move to strike the same and also to strike the evidence found on pages 595 and 596, in which the defendant Ripinsky attempts to testify to the date of the transfer from the Northwest Trading Co. to the defendant as occurring in the commencement of 1884.

By the COURT.—The original deed will be admitted and submitted. The motions will be denied and exceptions allowed.

Mr. COBB.—The defendant asks the Court to take judicial notice of the order of this Court found on page 96 of Volume 8 of the Journal, dated July 15, 1899, reading as follows:

"Saturday, July 15, 1899.

In the Matter of the Appointment of SOLOMON RIPINSKY as United States Commissioner for the District of Alaska, at Haines.

Whereas, it satisfactorily appearing to the Court that a [42] United States Commissioner should be appointed for Haines, in the District of Alaska, and it further appearing, that Sol Ripinsky is a resident of said Haines, is a citizen of the United States over the age of twenty-one years, and is a proper and suitable person to be appointed United States Commissioner, to be located and to reside at Haines, Alaska:

It is therefore ordered that the said Sol Ripinsky be and he is hereby appointed a United States Commissioner for the District of Alaska, to reside at Haines, Alaska, and authorized and empowered to fulfill the duties of the office according to law, with all the powers, privileges and emoluments of right pertaining to him, during the pleasure of this court and until his successor is appointed and qualified."

Mr. SHACKLEFORD.—It seems that the defendant in this case is raising a new issue about the citizenship and I may want to offer some evidence before the trial is closed.

By the COURT.—That is concerning—

Mr. SHACKLEFORD.—That is concerning both parties.

Mr. COBB.—There has been no issue raised as to the citizenship further than was in the case before.

Mr. SHACKLEFORD.—It is the first time I have noticed it.

May 18, 1911.

Mr. SHACKLEFORD.—We desire to call Mr. H. Fay for the purpose of proving the citizenship of most of the plaintiffs in this case.

Mr. COBB.—The defendant objects for the following reasons: That this case was not sent back for retrial or the taking of further evidence, but only for the Court to enter the proper judgment under the opinions of the Court in case [43] the pleadings should be reformed as intended in the second opinion; for the further reason that the testimony was taken by a referee, all of the record, and there is no motion made to recommit or take further testimony and it is now too late to make the proof; for the further reason that when the testimony was taken the issue as to the citizenship of the plaintiffs was then made and no testimony offered.

By the COURT.—It is not for the purpose of introducing evidence extensively, is it?

Mr. SHACKLEFORD.—No, sir. Mr. Cobb has started in since these pleadings were reformed to make a question about citizenship and the only thing I ask is the same privilege he has been granted with reference to his part of the evidence.

By the COURT.—I am not absolutely sure what shape the record in this case is now in, whether when the pleadings were reformed the cause might not have been recalled to the Court of Appeals by a recall of the mandate and the further disposing of the petition for rehearing, or whether it should again be appealed after its decision, the decision in this court upon the rendition of this evidence or the re-

submission of it. However that may be, the evidence will be admitted.

Mr. COBB.—Before the Court rules upon it, I want to correct a statement of counsel that I have introduced a new issue into it. In the second amended complaint tried before, they expressly pleaded the citizenship of the townsite claimants and there is a denial of that.

Mr. SHACKLEFORD.—You do not claim that you offered any evidence of Mr. Ripinsky's citizenship on the former trial?

Mr. COBB.—The evidence is in the record; I have introduced none this time; I have merely called the attention of the [44] Court to it.

(The objection was by the Court overruled. To which ruling defendant excepts—exception allowed.)

[Testimony of H. Fay, for Plaintiffs.]

H. FAY, called and sworn as a witness in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. SHACKLEFORD.)

Q. You are one of the parties to this case?

A. Yes, sir.

Q. I am going to call off the names of the plaintiffs in this case to you and whenever your knowledge permits you to state, why you may state whether or not they are citizens.

Mr. COBB.—I shall object to that method of examination, as not being fair; it is merely calling for his conclusion without explaining what his knowledge is, except what may be in his own mind.

(Testimony of H. Fay.)

By the COURT.—You may cross-examine.

(By Mr. SHACKLEFORD.)

Q. Do you know whether Mr. Hinchman is a citizen? A. Yes, sir.

Q. Is he? A. Yes, sir.

Q. William Holgate? A. Yes, sir.

Q. John G. Morrison? A. Yes, sir.

Q. J. A. Nettles? A. Yes, sir.

Q. Cortez Ford? A. Yes, sir.

Q. Tom Valeur? [45] A. Yes, sir.

Q. R. M. Odell? A. Yes, sir.

Q. D. Butrich?

A. I don't know with respect to him.

Q. E. J. Berger?

A. I am not sure about Berger.

Q. Ida Johnson? Who is Ida Johnson?

A. She is a woman that owns a house there; Stout is agent for her.

Q. The lot was originally located by her husband?

A. No, I believe she bought it.

By the COURT.—Keep to the citizenship.

Q. Is she a native woman?

A. No, she is a white woman.

Q. M. E. Handy? A. Yes, he is a citizen.

Q. Fred Handy? A. Yes, sir.

Q. G. C. De Haven? A. Yes, sir.

Q. Tim Creedon? A. Yes, sir.

Q. Benjamin A. Mahan? A. Yes, sir.

Q. Thomas Dryden?

A. No, Tom Dryden is not a citizen.

Q. Ed Fay? A. Yes, sir.

(Testimony of H. Fay.)

Q. James Fay? A. Yes, sir.

Q. H. Fay? A. Yes, sir.

Q. W. W. Warne? A. Yes, sir.

Q. Thomas Vogel?

A. Yes, sir; that should be Tim Vogel.

Q. C. Bjornstad? A. Yes, sir.

Q. H. Rappolt?

A. I don't know about Rappolt. **[46]**

Q. Karen Bjornstad?

A. She is a mother of Carl Bjornstad; he represented her property.

Q. M. V. McIntosh?

A. That is Mrs. McIntosh.

Q. What about her being an American citizen?

A. She is an American citizen.

Q. Mary V. McIntosh?

A. Yes; that is her daughter; she is an American citizen.

Q. Jesse Craig?

A. He is a citizen of the United States.

Q. E. A. Adams? A. Yes, sir.

Q. J. W. Martin? A. Yes, sir.

Q. A. J. Dennerline? A. Yes, sir.

Q. S. J. Weitzman? A. Yes, sir.

Q. Peter Johnson?

A. I am not sure about Johnson.

Q. Kate Kabler?

A. Mrs. Kabler lived in Juneau here for quite a while.

Q. V. Reade?

A. I am not sure about Reade.

(Testimony of H. Fay.)

Mr. SHACKLEFORD.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. When did you first become acquainted with William Holgate?

A. Well, I don't know as to the time when he first came there.

Q. Well, about when, Mr. Fay?

A. Well, it would be guesswork now; he has been there, I should judge about five or six years.

Q. About five or six years? A. Yes, sir. [47]

Q. You didn't know him before that?

A. No, sir.

Q. You don't know where he was born, of your own knowledge? A. No, sir.

Q. You don't know whether he has been naturalized or not? A. No, sir.

Q. How do you know he is a citizen then, of your own knowledge?

A. Well, he has voted there at Haines during my time.

Q. That is all that you base it upon?

A. Well, yes.

Q. For all you know, he may have been born in some foreign county and never was naturalized?

A. Yes, sir.

Q. How long have you known George W. Hinchman?

A. Well, since Hinchman came to the country, he has been there probably eight or nine years, probably more.

(Testimony of H. Fay.)

Q. You don't know where he was born?

A. No, sir.

Q. You don't know whether he was born in a foreign land or in America? A. No, sir.

Q. John G. Morrison, how long have you known him?

A. Well, I have known him about eight or nine years.

Q. Do you know where he was born?

A. No, sir.

Q. You do not know whether it was in a foreign land or America? A. No, sir.

Q. J. A. Nettles, how long have you known him?

A. About the same time, I guess.

Q. Do you know where he was born? **[48]**

Q. For all you know he may have been in some foreign land? A. Yes, sir.

Q. Cortez Ford—how long have you known him?

A. I have known him about seven or eight years, probably more, eight or nine, eight years, I guess it was all of that.

Q. You don't know where he was born?

A. No, sir.

Q. For all you know he may have been born in some foreign land? A. Yes, sir.

Q. Of foreign parents? A. Yes, sir.

Q. Tom Valeur,—do you know where he was born? A. No, sir.

Q. For all you know he may have been born in some foreign land? A. Yes, sir.

Q. And never naturalized? A. Yes, sir.

(Testimony of H. Fay.)

Q. R. M. Odell, how long have you known him?

A. Oh, about nine years or ten years.

Q. Do you know where he was born?

A. No, sir.

Q. As far as you know he may be a citizen of some foreign land?

A. Well, I don't think he would be a citizen of some foreign land if he would vote there in Haines.

Q. That is all you know about it? A. Yes, sir.

Q. Apart from that, though, as far as you know he may be a citizen of some foreign land? **[49]**

A. Yes, sir.

Q. D. Butrich, you say, is not a citizen.

A. I say I don't know whether he is or not.

Q. E. J. Berger, you say you don't know?

A. No.

Q. Ida Johnson you don't know—how long have you known M. E. Handy?

A. Nine or ten years, about.

Q. Do you know where he was born?

A. No, sir.

Q. You don't know but what he might have been born in some foreign land? A. No, sir.

Q. Of foreign parents? A. Yes, sir.

Q. Fred Handy is a brother of M. E. Handy, is he?

A. He is a son.

Q. He is a son? A. Yes, sir.

Q. Do you know where he was born?

A. No, sir.

Q. So far as you know he might have been born in a foreign land? A. Yes, sir.

(Testimony of H. Fay.)

Q. G. C. De Haven, how long have you known him? A. About ten years.

Q. Do you know where he was born?

A. No, sir.

Q. As far as you know he might have been born in some foreign land? A. Yes, sir.

Q. Tom Creedon, do you know where Tim was born? [50] A. No, I do not.

Q. As far as you know he might have been born in some foreign land? A. Yes, sir.

Q. B. A. Mahan; how long have you known Mr. Mahan? A. About six or seven years.

Q. That is as long as he has been in Haines?

A. Yes, sir.

Q. As far as you know he may have been born in some foreign land? A. Yes, sir.

Q. Thomas Dryden, you say is not a citizen?

A. I don't think he is.

Q. Ed Fay and James Fay and H. Fay, do you known are citizens? A. Yes, sir.

Q. Ed and James are your brothers?

A. Yes, sir.

Q. W. W. Warne; how long have you known him?

A. Well, he was in the country when I came; he was at Haines when I came.

Q. He has been gone eight or ten years?

A. Yes, he has been gone quite *while.*

Q. Do you know where he was born?

A. No, sir.

Q. As far as you know he may have been born in a foreign land? A. Yes, sir.

(Testimony of H. Fay.)

Q. And of foreign parentage? A. Yes, sir.

Q. Thomas Vogel or Tim Vogel, as he is sometimes called; how long have you known Tim?

A. Ten or eleven years. **[51]**

Q. Do you know where he was born?

A. No, sir.

Q. As far as you know he may have been in a foreign land? A. Yes, sir.

Q. And of foreign parents? A. Yes, sir.

Q. C. Bjornstad; how long have you known Mr. Bjornstad? A. About ten years.

Q. Do you know where he was born?

A. No, sir.

Q. So far as you know, he may have been born in a foreign land? A. Yes, sir.

Q. Of foreign parents?

By the COURT.—He didn't say Mr. Bjornstad was a citizen, did he?

The WITNESS.—Yes, sir.

Q. H. Rappolt; I believe you stated you did not know whether Rappolt was a citizen or not?

A. No, sir.

Q. Karen Bjornstad; do you know where she was born?

A. No, sir; that is the mother of Carl Bjornstad.

Q. She is the mother of Carl, and you don't know where either one of them was born?

A. Well, they told me—

Q. I mean of your own knowledge?

A. No, I do not.

Q. And so far as you know they may have been

(Testimony of H. Fay.)

born in a foreign land, of foreign parentage?

A. Yes, sir.

Q. M. V. McIntosh, how long have you known her? A. About seven or eight years. **[52]**

Q. Do you know where she was born?

A. No, sir.

Q. So far as you know, she may have been born in a foreign land of foreign parentage?

A. Yes, sir.

Q. Mary V. McIntosh is a daughter of the other, you said? A. Yes, sir.

Q. Do you know where she was born?

A. No, sir.

Q. So far as you know she may have been born in a foreign land, of foreign parentage?

A. Yes, sir.

Q. Jesse Craig; do you know where he was born?

A. No, sir.

Q. So far as you know he may have been born in a foreign land and of foreign parentage?

A. Yes, sir.

Q. E. A. Adams; how long have you known him?

A. About eleven years, or such a matter.

Q. Do you know where Mr. Adams was born?

A. No, sir.

Q. So far as you know, he may have been born in a foreign land and of foreign parentage?

A. Yes, sir.

Q. J. W. Martin, how long have you known Martin? A. About twelve years.

A. Do you know where he was born?

(Testimony of H. Fay.)

A. No, sir.

Q. So far as you know, he may have been born in a foreign land and of foreign parentage?

A. Yes, sir. **[53]**

Q. A. J. Dennerline; do you know where he was born? A. No, sir.

Q. As far as you know he may have been born in a foreign land and of foreign parentage?

A. Yes, sir.

Q. S. J. Weitzman; do you know where Mr. Weitzman was born? A. No, sir.

Q. So far as you know he may have been born in a foreign land and of foreign parentage?

A. Yes, sir.

Q. Peter Johnson; you say you don't know; Mrs. Kate Kabler, you say you don't know?

A. No, I do not; she lives in Juneau.

Q. And V. Reade, you don't know?

A. I don't know about Reade.

Mr. COBB.—That is all.

(By Mr. SHACKLEFORD.)

Q. All these men that have been mentioned have exercised the privileges of citizenship up there, haven't they?

Mr. COBB.—We object, as not the best evidence.

By the COURT.—It is leading.

Q. State what you do know about their exercising the privilege of citizenship.

Mr. COBB.—I object to that as calling for a conclusion of the witness.

(Objection overruled; to which ruling counsel for

(Testimony of H. Fay.)

defendant excepts; exception allowed.)

Q. Just state what you know about their exercising the privileges of citizenship.

A. Why, they exercise the privileges of citizenship. [54]

Mr. SHACKLEFORD.—That is all, Mr. Fay, at this time.

May 19, 1911.

H. FAY, recalled.

Direct Examination.

(By Mr. SHACKLEFORD.)

Q. Mr. Fay, you were one of the citizens' committee in charge of the protection of the rights up there? A. Yes, sir.

Q. I will ask you to state whether, if you know, *applicati* was made by the citizens of Haines for a townsite survey.

Mr. COBB.—We object as not the best evidence; if they *mad* an application it would necessarily be on record.

Mr. SHACKLEFORD.—I will explain to the Court exactly the reason I ask Mr. Fay this question. Mr. Stowell's record shows probably 30 or 40 letters on the subject back and forth and finally the request was rejected. I don't want to encumber the record with a lot of correspondence. I can have it certified and file it with the Court if necessary, but I simply want to show that the application was made.

Mr. COBB.—Counsel has stated the objection to it, as well as it could be stated. In the first place, it is a matter of record; in the next place, if they have

(Testimony of H. Fay.)

the record here it will show that the request was rejected.

Mr. SHACKLEFORD.—I will ask leave to file, after the argument of the case, a certified copy of the correspondence and withdraw the witness.

Mr. COBB.—I shall object to that; it is a reopening of the case. This case was tried before a Referee; they plead that in the original case, and for the further reason that so far as the plaintiffs are concerned in this case, the question [55] of their right, title and interest is no longer an open one; it has been finally foreclosed by the judgment of the Appellate Court, the court of last resort.

By the COURT.—That is all, Mr. Fay. I will rule on the offer of the evidence when the offer is made. It will be ruled on when you offer it, the same as though it was offered now.

Mr. COBB.—Of course, if the Court should admit it, we will reserve the right to introduce any further testimony we might deeem advisable.

By the COURT.—Very well.

AFTERNOON SESSION.

Mr. SHACKLEFORD.—In this Haines case, I desire to offer in evidence a certified copy of letter of July 17, 1905, W. A. Richards, Commissioner of the General Land Office to the U. S. Surveyor-General at Sitka, Alaska, certified to by the Surveyor-General, and ask to have it marked.

(It is marked Exhibit "A," 2d Hearing.)

By the COURT.—It will be admitted.

Mr. SHACKLEFORD.—I will read it:

[Exhibit "A"—2d Hearing.]

"COPY.

E. C.L.D.B.

A. W. B.

110273–1905.

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
Washington, D. C.

July 17, 1905.

Address only the
Commissioner of the General Land Office.

Subject: Survey of Haines Townsite.

U. S. Surveyor General,
Sitka, Alaska.

Sir:

I have received your letter dated June 15, 1905, transmitting **[56]** a copy of the petition of George Vogel and 57 other settlers at Haines, for the official survey of the boundary of a townsite, also copy of the proposals of Deputy C. E. Davidson for making surveys, addressed to Mr. C. Ford of Haines.

The petition has been favorably considered, although any further action should be contingent upon the action that may be taken upon a homestead entry that may be made by Sol Ripinsky under Survey No. 573.

If said survey shall be approved in your office, as authorized, the applicant's right to make entry would be next considered; and the Department should not incur the expense of a townsite survey under the present uncertainty of these conditions.

The bid of Mr. Davidson shows that he is not aware that the work must be done under two different proposals which cannot be combined as he has done. If the survey is authorized, the boundary will be done under contract or instructions from your office, and paid for by the United States; but the subdivision must be done under contract with the trustee representing the people, and paid for from proceeds of sale. You will advise bidders accordingly.

Moreover, while the Haines people may choose to award the work to none but Deputy Davidson, the exterior line must be a subject of proper notices to deputies who are near enough to be probable bidders. In the survey of the boundary, the condition proposed by this deputy as to citizens paying his expenses could not be considered. Neither will you approve a proposition for a certain sum for field work and a per diem for unlimited time for making plats, as found in his bid.

From all the above, it is evident that the townsite boundary cannot very soon be provided for.

Very respectfully,

(Signed) W. A. RICHARDS,
Commissioner.

J. C. P. [57]

Office of the U. S. Surveyor General.
Juneau, Alaska, May 19, 1911.

I certify that the foregoing and attached transcript of a letter from the Commissioner of the General Land Office to the U. S. Surveyor General of Alaska, dated July 17, 1905, "Subject: Survey of Haines

Townsite," is a true and correct copy of said letter, and of the whole thereof, now on file in this office.

(Signed) WM. L. DISTIN,
U. S. Surveyor General for Alaska. [58]

And after the evidence had all been heard by the Court the defendant prayed the Court to find as follows:

[Findings Prayed for by Defendant.]

1st. The land in controversy in this suit was on the 14th day of December, 1897, in the actual possession and occupancy of the defendant, Solomon Ripinsky, under a deed and claim of ownership hereinafter set out. And afterwards on the said date the plaintiff H. Fay and a number of other persons, none of whom are parties to this suit, or now claim any of the property in controversy, entered upon said property and forcibly and against the protests of the defendant ousted him therefrom, and said parties thereafter laid out a townsite or attempted to, embracing the land in controversy, and had one Fogelstrom to make a plat of the same into lots, blocks and streets. Some of the said premises was located as town lots, some as trade and manufacturing cities, some as homesteads and a part was not located at all. Other persons followed and locations have been made by the plaintiffs from that date promiscuously up till after the institution of this suit, but all such locations and occupancies as were made and asserted by the plaintiffs were against the protests and rights of the defendant.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

2d. The ground in controversy was surveyed for one George Dickinson by an officer of the U. S. "Jamestown" in the year 1871. Dickinson at that time was acting for a concern known as the Northwest Trading Company and the tract so surveyed was at that time fenced and the corner posts set and buildings were constructed thereon and a portion cleared and cultivated. In the year 1880 George Dickinson succeeded to [59] interests of the Northwest Trading Co. and from that year to the year 1888, when he died, Dickinson and his family continued to occupy said premises, residing thereon and cultivating a portion thereof and the said Dickinson and his family were in the occupancy, possession and claim of said premises on the 17th day of May, 1884.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

3d. In 1888 George Dickinson died and left surviving him his wife, Sarah Dickinson, his son, William Dickinson. Mistress Sarah Dickinson was a native Alaska woman. The Dickinson family continued in the possession and claim of said premises until the 2d day of December, 1897, upon which date she sold and conveyed said premises to the defendant Solomon Ripinsky and placed him in possession thereof, and on the 21st day of December, William Dickinson also sold whatever interest he had in said premises to

the defendant, said Ripinsky.

But the Court refused said prayer, to which ruling of the Court, the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

4th. On the 14th day of December, 1897, the plaintiff Harry Fay, accompanied by some five or six other men, because of the report that a railroad was to be built from that point, went from the village of Chilcat, Alaska, about a mile distant from the property in controversy in this suit, and against the protest and with a disregard of the rights and possession of the defendant entered upon said premises and made locations thereon of town lots, locations for trade, and manufacturing sites, etc., and thereafter had one Foglestrom lay out some six blocks of ground embracing the property in controversy, into blocks and lots, substantially as shown upon the plat attached to the third amended complaint. [60]

But the Court refused said prayer, to which ruling of the Court, the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

5th. On June 23d, 1903, the defendant, Solomon Ripinsky, posted and filed a notice of location of his homestead embracing all the land in controversy and also the buildings and improvements then and now occupied by him and purchased from the Dickinsons. Thereafter on March 23–26, 1905, the defendant had Survey No. 573 made by U. S. Deputy Surveyor, C. E. Davidson, as his homestead claim, which survey

was officially approved, on July 31, 1905, by the Surveyor-General for Alaska. This survey embraced all the land in controversy. After the survey was made the defendant's notice of homestead location *location* was amended to conform to the official field-notes.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

6th. Thereafter the defendant duly and regularly applied for patent for the said premises as his homestead, and published his notice as required by law, when the plaintiffs filed the adverse claim, a copy of which is attached to the third amended complaint and instituted this suit.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

7th. The land in controversy in this suit is claimed by the plaintiffs in severalty and not jointly, and embraces the following lots and blocks shown on the plat "Exhibit No. 1," in so far as the same is in conflict with the U. S. Survey No. 573, to wit:

Lots 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 14, 15, 16, and [61] 17, of Block 1.

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of Block 2.

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, and 12 of Block 3.

Lots 1, 3, 4, 5, and 6 of Block 4.

Lots 1, 2, 3, 4, 5, and 6 of Block 5.

And lot 2 of block 6.

The balance of the land embraced within Survey No. 573 is not claimed by any of the plaintiffs.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

8th. Plaintiffs have failed to prove that any of them are citizens of the U. S. except the three Fays.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

10th. The plaintiffs have failed to show any interest, jointly, severally or otherwise, in any of the streets, avenues or alleys mentioned in the complaint.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to find as follows:

11th. The defendant, Solomon Ripinsky, is a citizen of the U. S., qualified to enter lands as a homestead and has fully complied with the law, entitling him to enter the premises in controversy.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to conclude as matter [62] of law as follows:

1st. That the defendant's grantors were protected in their possession and claim to said premises by the

8th section of the act of May 17, 1884, and they conveyed a good title to the defendant, which he was entitled to enter as his homestead under the act of Congress extending the homestead laws to Alaska.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

The defendant further prayed the Court to rule as matter of law as follows:

3d. The defendant is entitled to a judgment on his cross-complaint for the ground in controversy and for his costs.

But the Court refused said prayer, to which ruling of the Court the defendant then and there excepted.

And thereafter the Court, having fully considered the case, announced its opinion as follows: [63]

[Opinion.]

By the COURT.—In this Hinchman vs. Ripinsky case I feel constrained to decide the case largely, if not entirely, upon what I consider the law of the case. The case was started before Judge Gunnison. A suit to quiet title of these plaintiffs against the defendant, started as an adverse suit, but upon the part of the defendant two or more motions were made, one to make more specific by setting out the particular parcels of ground within the alleged townsite claimed by the plaintiffs and the other striking out all reference to the proceedings in the land office showing it to be an adverse suit. These motions were granted. When the evidence was all in, being taken before the referee, Judge Gunnison decided, making general findings in favor of the plaintiffs and making general

findings against the defendant, particularly finding that the defendant did not obtain any right by reason of the transfer from the Dickinsons and that he did not have any right other than the right in two particular tracts, small tracts, that were conceded to him by the pleadings. From this decision an appeal was taken by the plaintiffs to the Court of Appeals and in the review of the case by the Court of Appeals, they go generally into two propositions. First, the defendant's demurrer that had been interposed below to the misjoinder of parties plaintiff, and second, into the character of the title of plaintiffs.

The Court of Appeals decided, first, that there was a misjoinder of plaintiffs in that there was nothing common in their title; that although they were all fighting Mr. Ripinsky, that some claimed title by possession, some claimed title by location of a lot and some claimed title by location of a trading and manufacturing site, and some by having bought somebody else's possession, and in various other ways, and their rights being so diversified and several, that they could not join in [64] one suit against the defendant. Second, they decided,—I will read from the opinion:

"From the facts as portrayed by the testimony, it appears that some of these complainants have no shadow of claim of title, except mere possession. They have no location under the alleged townsite of Haines, no deed from previous holders, if this were sufficient, and no pretense that they are claiming under authority of Congress. It is not even shown that a site has ever been entered for townsite purposes on pursuance of the laws of Congress as ex-

tended to Alaska. Section 11, Act of March 3, 1891, c. 561, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1467); 1 Fed. St. Ann. 53. And the extent of the right acquired in alleged pursuance of the townsite statute is that of mere possession only, with the privilege, perhaps of regularly entering a townsite in the future, if the citizens so desire, when their rights will depend upon prior possession It does not seem to us that such possession exhibits a sufficient equitable title upon which to base a suit to remove a cloud, and we so hold."

Now, after so deciding, upon the petition for rehearing in which it was called to the attention of the Appellate Court that this had been instituted as an adverse suit, after the defendant's application in the land office and the advertisement for adverse claimants and the filing of an adverse, the Court then held that the complaint was sufficient, as follows:

"It appears from the original complaint that the complainants attempted to pursue the requirements of the statutes, and that it was the endeavor to settle an adverse claim to the claim of the defendant Ripinsky, in pursuance thereof. Among other things, it is shown that Ripinsky filed his application for patent on the 2d day of March, 1906, and thereafter published notice; and on June 3, 1906, and within 30 days after the period of publication of said notice, the plaintiffs filed in the land office their notice of adverse claim, a copy of which is annexed to the complaint. If that complaint was filed immediately after the date of its verification, the action would have been commenced within the requisite 60 days.

So that for all the purposes of prosecuting an action for the quieting of the title as adverse claimants, under the statutes (sec. 10), the complaint appears to be sufficient."

It would seem that that left the case in this shape, that there was little for this Court to do, the issues and evidence being substantially the same, but to martial the different findings and rulings of the lower court and the Court of Appeals [65] into one decree. It may be that the proper proceedings would have been after the pleadings were reformed to move in the Court of Appeals for a recall of the mandate and let that Court decide this case as it appears to have intimated at the close of their decision.

After having ruled that the original complaint was sufficient on an error that was not assigned, indeed, an error committed against the eventually prevailing part, the Court of Appeals must have been then in this position, that they could not anticipate what the issues would be on the pleadings as reformed, or what the evidence might be, if any were taken.

It was, therefore, probably considered by it illogical for that Court in anticipation to decree that its finding regarding the sufficiency or insufficiency of plaintiffs' title would apply to the new pleadings and the new proofs. It is probably true, as a general rule, that on an order for rehearing all parts of the old opinion not expressly adopted are abandoned, but this case would seem to be an exception to that rule.

The decision of Judge Gunnison that the defendant had no right has been in no way reversed, therefore it is the opinion of this Court that that is a part

of the law of this case, in so far as it is applicable to the new issues and the new proof, both of which so far as the claim of the defendant is concerned, have not been materially changed by the reforming of the pleadings or by the additional evidence that has been offered.

This Court is not clear that on an adverse suit brought to quiet title that any less title or any different title is sufficient to maintain such an adverse suit than that that would maintain a suit to quiet title under our statutes. In fact, if there is any difference, the stricter rule would prevail in the former case, for, in an adverse suit, the plaintiff, to [66] succeed, must not only show a better title than the defendant but show title also as against the United States.

The Court of Appeals have decided that under our statute the evidence in this case was not sufficient to warrant a decree in favor of plaintiffs. Therefore, the finding of that Court being that the title of the plaintiff was insufficient to give them a decree removing a cloud or quieting the title, this Court will hold that that is the law of this case as far as the plaintiffs are concerned. The obstacles in the way of plaintiffs' title pointed out by the Court of Appeals, on account of there being no boundaries to the alleged town or townsite, have not been removed on the last hearing, likewise no period of time when the alleged title is initiated. The case cited in the petition for rehearing was one pending after townsite entry, between the trustee and the *cestui qui trust.*

This being an adverse suit in which both sides may

lose except as to costs, the decree will be to that effect; the defendant will recover costs.

The finding of Judge Gunnison regarding plaintiffs' possession or occupancy,—you will have to work out a finding to modify that as modified by the Court of Appeals, eliminating particularly those parts outside the Foglestrom plat. Under the regulations of the land office the survey of the boundaries of a townsite is made by the Land Office and paid for out of public money. It seems by the evidence that was offered by the plaintiffs on this trial that Vogel and 57 others had petitioned, though the petition is not in evidence, that such a survey be made, but the land office, while approving in general terms of their application, had declined to go to the expense of this survey until Ripinsky's right to this homestead had been determined and until that was done, as pointed out by the Court of Appeals, this town of Haines had no boundaries, had no limits, [67] it was an indefinite settlement. The Court will adopt the Fogelstrom plat as defining at that time the limits of their claim, but the Court will hold that as to the ground included in Survey 573 that fell outside of the Fogelstrom plat, they had or made no claim except by this suit; their claim of occupancy or possession of that will be rejected.

The Court will find that the plaintiffs that Mr. Fay testified to as being citizens of the United States were citizens of the United States. The Court will find that Mr. Ripinsky is a citizen of the United States.

And thereupon the defendant by its counsel ex-

cepted to the ruling and opinion of the Court that the decision of Judge Gunnison that the defendant had no right has been in no way reversed; therefore it is the opinion of this Court that that is a part of the law of this case in so far as it is applicable to the new issues and the new proofs, both of which, so far as the claim of the defendant is concerned, will not be materially changed by the reforming of the pleadings or by the additional evidence that has been offered; on the ground that the same was not the law and that it was the duty of the Court to make up findings as to the defendant's title from the evidence before it and said exceptions allowed. **[68]**

[Order Allowing Exceptions, etc.]

And the above and foregoing, to wit, the testimony and proofs contained in the printed record of this case on the former appeal, No. 1782 in the said Appellate Court, which testimony is contained in the said printed record from and inclusive of page 57 thereof down to and inclusive of page 886; the oral evidence of H. Fay, and the record from the Surveyor-General's Office and the record of this Court as to the citizenship of the defendant, was all the evidence offered by the parties hereto, or received by the courts; and the said evidence, and the foregoing exceptions of the defendant are hereby certified by me to be correct, are allowed, ordered filed, and made a part of the record of this case.

And it is further ordered that the foregoing bill of exceptions may and does constitute the plaintiff's bill of exceptions, except that plaintiff may have his bill of exceptions certified to the Appellate Court without attaching thereto Volumes 1, 2 and 3 of the

printed record in this case, numbered Case 1782, heretofore printed in the Appellate Court, the entire contents of which volumes were referred to and used by the *plaintiff* in the last trial of this case before this Court. This order is made pursuant to stipulation of counsel on file herein.

Done in open court this 12th day of June, 1911, and during the term at which said cause was tried.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: No. 547–A. In the District Court for the District of Alaska, Division No. 1. G. W. Hinchman et al. vs. Solomon Ripinsky. Bill of Exceptions. Filed Jun. 12, 1911. E. W. Pettit, Clerk. By ————, Deputy. **[69]**

[Praecipe for Record.]

Lewis P. Shackleford.
William S. Bayless.

SHACKLEFORD & BAYLESS,
ATTORNEYS AND COUNSELLORS AT LAW.
JUNEAU, ALASKA.

August 26th, 1911.

To the Clerk of the District Court,
Division No. One,
Juneau, Alaska.

Dear Sir:—

Enclosed herewith you will please find a copy of the bill of exceptions and testimony in cause 547–A. In making up the record upon appeal we desire you to add to the bill of exceptions and certify the following papers:

1. Copy of the original complaint filed July 2d, 1906.
2. Summons issued July 2d, 1906.
3. Order to make more definite and certain, filed December 10th, 1906. Signed R. A. Gunnison, Judge.
4. Order extending time to file amended complaint December 26th, 1906. Signed Royal A. Gunnison, Judge.
5. Amended complaint, filed March 28, 1907.
6. Order signed by Judge Wickersham, filed May 7th, 1907, striking the portions of plaintiff's complaint referring to proceeding in the Land Office, on motion of the defendant and containing the exceptions of the plaintiff thereto.
7. Original Exhibit 7 referred in the bill of exceptions. '(If you can obtain possession of same, if not then certify that yau cannot find the same.)
8. Findings of fact and conclusions of law.
9. Decree rendered May 29th, 1911, 10th exceptions to findings of facts and conclusions of law and proposed additional findings of facts and conclusions of law *tended* by [70] plaintiff.

Please prepare all this record so as to have it ready for certification, as soon as an order of appeal is allowed.

I understand that Judge Cushman is to be there about September 10th, and I would like to have the record above ready at that time. You will also include in your transcript all of the papers to be here-

after filed in the taking of the appeal.

Yours truly,

LEWIS P. SHACKLEFORD.

Encls.

[Endorsed]: No. 547–A. In the District Court for the District of Alaska, Division No. 1. G. W. Hinchman et al. vs. Sol Ripinsky. Letter and Praecipe of L. P. Shackleford. Dated August 26, 1911. Filed Aug. 28, 1911. E. W. Pettit, Clerk. By ————, Deputy. **[71]**

In the United States District Court for the District of Alaska, Division No. One, at Juneau.

No. 547–A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Petition for Allowance of Appeal.

G. W. Hinchman et al., plaintiffs in the above-entitled cause, feeling themselves aggrieved by the judgment and decree rendered against them in said cause on the 29th day of May, 1911, pray the Court to allow them an appeal from the said decree to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, and to fix in the order allowing said appeal the security they should be required to give for costs.

SHACKLEFORD & BAYLESS,

Attorneys for Plaintiffs.

Service of a copy of the within is admitted this 11th day of September, 1911.

R. W. JENNINGS,
Attorney for Defdt.

[Endorsed]: Original. No. 547–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., Plaintiffs, vs. Solomon Ripinsky, Defendants. Petition for Allowance of Appeal. Filed Sep. 11, 1911. E. W. Pettit, Clerk. By ————, Deputy. Shackleford & Bayless, Attorneys for Plaintiffs and Appellants. Office, Juneau, Alaska. **[72]**

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

No. 547–A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendants.

Assignment of Errors.

Comes now the plaintiffs herein by their attorneys and assign the following errors in the proceedings of the Court upon which they will rely in the Appellate Court, to wit:

I.

The Court erred in refusing the plaintiffs to strike all testimony concerning conversation between the defendant, Ripinsky, and the Dickinsons, as to the

acquisition of title from the Northwest Trading Company, and in refusing to sustain the objections to said testimony, and in refusing to strike the evidence found on page 585 and 596 of the printed record of the Circuit Court of Appeals, in which the defendant Ripinsky attempted to testify as to the date of an alleged transfer from the Northwest Trading Company to the defendant as occurring in the commencement of the year 1884.

II.

The Court erred in making that portion of the findings which purports to exclude E. G. Burger, D. Butrick, Thomas Dryden, Peter Johnson, V. Reade and H. Rappolt from the benefit of said findings. **[73]**

III.

The Court erred in refusing the request of the plaintiffs to find that the inhabitants of the town of Haines made application to the United States Surveyor General for the District of Alaska for the initiation of a townsite patent, by asking for a survey of the exterior boundaries of the townsite of Haines, which said application was suspended pending the Ripinsky hearing as shown in Plaintiff's Exhibit "A" second hearing, dated July 17th, 1905.

IV.

The Court erred in finding that the land embraced in the platted portion of survey 573 had been held by the plaintiffs and their grantors in severalty, and in refusing to find that prior to townsite entry the said lands and the streets were held in community.

V.

The Court erred in refusing the request of the plaintiffs for a conclusion of law upon the findings that the plaintiffs (having been occupants of the townsite on and prior to the homestead entry of defendants) *the plaintiffs* are entitled to a decree to the property described in plaintiffs' complaint and are entitled to all the benefit of townsite claimants, including the entry of said land as townsite land under the laws of the United States applicable to Alaska.

VI.

The Court erred in refusing to adjudge that the defendants had no title to the land in dispute as against the plaintiffs.

VII.

The Court erred in adjudging the costs of this cause against the plaintiffs and in refusing to adjudge all of the costs [74] from the inception of the cause to the entry of the decree on the 29th of May, 1911, against the defendants.

VLLL.

The Court erred in making and entering the decree herein.

IX.

The Court erred in not decreeing herein that the plaintiffs were entitled to the property in controversy and that the defendants were not entitled to the same.

X.

The Court erred in not decreeing herein as a matter of course from the findings *ended* that the plain-

tiffs were entitled to the property in controversy as townsite land against the claim of the defendant.

SHACKLEFORD & BAYLESS,
Attorneys for Plaintiffs.

Service of a copy of the within is admitted this 11th day of Sept., 1911.

R. W. JENNINGS,
Attorney for Deft.

[Endorsed]: Original. No. 547–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. G. W. Hinchman, et al., Plaintiffs, vs. Solomon Ripinsky, Defendant. Assignment of Errors. Filed Sep. 11, 1911. E. W. Pettit, Clerk. By ————, Deputy. Shackleford & Bayless, Attorneys for Appellants. Office: Juneau, Alaska. [75]

In the United States District Court for the District of Alaska, Division No. 1, at Juneau.

No. 547–A.

G. W. HINCHMAN et al.,
Plaintiffs,

vs.

SOLOMON RIPINSKY et al.,
Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Charles Goldstein and Henry Shattuck, are held and firmly bound unto Solomon Ripinsky, jointly and severally, in the sum of Two Hundred

and Fifty Dollars ($250.00), to be paid to the said Solomon Ripinsky, his attorneys, executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally firmly by these presents.

SEALED with our seals and dated this 11th day of September, 1911.

WHEREAS lately at a session of the District Court for the District of Alaska, Division No. One, in a suit pending in said Court between the plaintiffs herein and the defendants above named, an order and decree was rendered against the prayer and contention of the plaintiffs on the 29th day of May, 1911, and the plaintiffs (and appellants) having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said order and decree and a citation directed to the defendants is about to be issued, citing him to appear in said Court; [76]

Now, the condition of the above obligation is such that if the said plaintiffs shall prosecute said appeal to effect and shall answer all damages and costs that may be awarded against them if they fail to make their appeal good, then this obligation to be void; otherwise to remain in full force and effect.

H. SHATTUCK.
C. GOLDSTEIN.

W. F. BAYLESS.
H. MALONE.

Sufficiency of sureties on the foregoing bond approved this 11th day of September, 1911.

EDWARD E. CUSHMAN,
Judge.

United States of America,
District of Alaska,—ss.

Henry Shattuck and Charles Goldstein, being first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident of the District of Alaska and is not a counsellor or attorney, marshal, clerk of any court or other officer of any court; that he is worth the sum of Two Hundred Fifty Dollars ($250.00), exclusive of property exempt from execution and over and above all just debts and liabilities.

H. SHATTUCK.
C. GOLDSTEIN.

Subscribed and sworn to this 11th day of September, 1911.

[Seal] W. S. BAYLESS,
Notary Public for Alaska.

Service of a copy of the within is admitted this 11th day of Sept., 1911.

R. W. JENNINGS,
Attorney for Defdt. [77]

[Endorsed]: Original. No. 547–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., *Plaintiff,* vs. Solomon Ripinsky, Defendant. Bond on Appeal. Filed Sept. 11, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. Shackleford & Bayless, Attorneys

for Plaintiffs and Appellants. Office, Juneau, Alaska. [78]

In the United States District Court for the District of Alaska, Division No. One, at Juneau.

No. 547–A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Order Allowing an Appeal.

This cause came on to be heard on the petition of G. W. Hinchman et al., for the allowance of an appeal from the decree rendered herein on the 29th day of May, 1911, and the Court having heard said petition and the assignment *or* errors having been filed herewith—

IT IS ORDERED that said appeal be and the same is hereby allowed, and the said G. W. Hinchman et al. shall give a cost bond on the appeal for the sum of Two Hundred and Fifty Dollars ($250.00).

Dated this 11th day of September, 1911.

EDWARD E. CUSHMAN,

Judge.

Service of a copy of the within is admitted this 11th day of September, 1911.

R. W. JENNINGS,

Attorney for Defdt.

[Endorsed]: Original. No. 547–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., Plaintiffs, vs. Solomon Ripinsky, Defendant. Order Allowing Appeal. Filed Sep. 11, 1911. E. W. Pettit, Clerk. By ————, Deputy. Shackleford & Bayless, Attorneys for Plaintiffs and Appellants. Office, Juneau, Alaska. [79]

In the United States District Court for the District of Alaska, Division No. One, at Juneau.

No. 547–A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY et al.,

Defendants.

Citation.

The President of the United States to Solomon Ripinsky and to John H. Cobb and Robert W. Jennings, Attorneys for the Defendant Herein, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco in the State of California, within thirty days from the date of this writ pursuant to an appeal filed in the clerk's office of the District Court for the District of Alaska, Division No. One wherein the appellants and plaintiff above named, G. W. Hinchman et al., are appellants and you are the appellee, to

show cause, if any there be, why judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 11th day of September, 1911.

EDWARD E. CUSHMAN,
District Judge for the District Court for the District of Alaska.

[Seal] Attest: E. W. PETTIT,
Clerk for the District Court for the District of Alaska. [80]

Service of a copy of the within is admitted this 11th day of Sept., 1911.

R. W. JENNINGS,
Attorney for Defdt. [81]

[Endorsed]: Original. No. 547–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., *Plaintiff,* vs. Solomon Ripinsky, Defendant. Citation. Filed Sep. 11, 1911. E. W. Pettit, Clerk. By ————, Deputy.

In the United States District Court for the District of Alaska, Division No. One, at Juneau.

No. 547–A.

G. W. HINCHMAN et al.,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Order [Directing Transmission of Original Exhibit].

Upon hearing and considering the motion of the plaintiffs herein:

IT IS ORDERED, that the Clerk of the above-entitled Court transmit to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, defendant's original Exhibit Number 7 on file in this cause.

Dated this 11th day of September, A. D. 1911.

EDWARD E. CUSHMAN,
Judge.

Due service of a copy of the within is admitted this 11th day of Sept., 1911.

R. W. JENNINGS,
Attorney for Defdt.

[Endorsed]: Original. No. 547–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. G. W. Hinchman et al., Plaintiff, vs. Solomon Ripinsky, Defendant. Order. Filed Sep. 11, 1911. E. W. Pettit, Clerk. By ————, Deputy. Shackleford & Bayless, Attorneys for Plffs. Office, Juneau, Alaska. [82]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 547–A.

G. W. HINCHMAN, WILLIAM HOLGATE, JOHN G. MORRISON, J. A. NETTLES, CORTEZ FORD, TOM VALEUR, R. M. ODELL, D. BUTRICH, E. J. BERGER, IDA JOHNSON, M. E. HANDY, FRED HANDY, G. C. DE HAVEN, TIM CREEDON, BENJAMIN A. MAHAN, THOMAS DRYDEN, ED. FAY, JAMES FAY, H. FAY, W. W. WARNE, THOMAS VOGEL, C. BJORNSTAD, H. RAPPOLT, KAREN BJORNSTAD, M. V. McINTOSH, MARY V. McINTOSH, JESSE CRAIG, E. A. ADAMS, J. W. MARTIN, A. J. DENNERLINE, S. J. WEITZMAN, PETER JOHNSON and MRS. KATE KABLER, V. READ,

Plaintiffs,

vs.

SOLOMON RIPINSKY,

Defendant.

Certificate [of Clerk U. S. District Court to Record].

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division No. 1, do hereby certify that the foregoing and hereto attached eighty-two pages of typewritten and written matter, numbered from one to eighty-two, both inclusive, and the three printed volumes of the record in Cause No. 1782 in

the United States Circuit Court of Appeals for the Ninth Circuit, constitute a full, true and complete record, and the whole thereof, on appeal, as requested in the praecipe of the appellant, filed herein and made a part hereof, in Cause No. 547–A, entitled G. W. Hinchman, William Holgate, John G. Morrison, J. A. Nettles, Cortez Ford, Tom Valeur, R. M. Odell, D. Butrich, E. J. Berger, Ida Johnson, M. E. Handy, Fred Handy, G. C. De Haven, Tim Creedon, Benjamin A. Mahan, Thomas Dryden, Ed. Fay, James Fay, H. Fay, W. W. Warne, Thomas Vogel, C. Bjornstad, H. Rappolt, Karen Bjornstad, M. V. McIntosh, Mary V. McIntosh, Jesse Craig, E. A. Adams, J. W. Martin, A. J. Dennerline, S. J. Weitzman, Peter Johnson and Mrs. Kate Kabler, V. Read, plaintiffs and appellants, vs. Solomon Ripinsky, defendant and appellee.

I do further certify that the said record is by virtue of the order allowing appeal and the Citation issued herein and made a part hereof, and the return in accordance therewith.

I do further certify that the said record has been prepared by me in my office, and the cost of preparation, examination and certificate, amounting to Thirty-seven and 70/100 Dollars ($37.70), has been paid to me by Messrs. Shackleford & Bayless, attorneys for appellants.

In witness whereof I have hereunto set my hand and the official seal of the above-entitled court this 13th day of September, 1911.

[Seal] E. W. PETTIT,

Clerk of the District Court for the District of Alaska, Divivion No. 1.

[Endorsed]: No. 2045. United States Circuit Court of Appeals for the Ninth Circuit. G. W. Hinchman, William Holgate, John G. Morrison, J. A. Nettles, Cortez Ford, Tom Valeur, R. M. Odell, D. Butrich, E. J. Berger, Ida Johnson, M. E. Handy, Fred Handy, G. C. De Haven, Tim Creedon, Benjamin A. Mahan, Thomas Dryden, Ed. Fay, James Fay, H. Fay, W. W. Warne, Thomas Vogel, C. Bjornstad, H. Rappolt, Karen Bjornstad, M. V. McIntosh, Mary V. McIntosh, Jesse Craig, E. A. Adams, J. W. Martin, A. J. Dennerline, S. J. Weitzman, Peter Johnson, Mrs. Kate Kabler, and V. Read, Appellants, vs. Solomon Ripinsky, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed September 20, 1911.

F. D. MONCKTON,
Clerk.

No. 2047

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC CREOSOTING COMPANY, a corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

No.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC CREOSOTING COMPANY, a corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

INDEX OF PRINTED TRANSCRIPT OF RECORD.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, *Plaintiff and Defendant in Error,* vs. PACIFIC CREOSOTING COMPANY, a corporation, *Defendant and Plaintiff in Error.*	No. 1826.

NAMES AND ADDRESSES OF COUNSEL.

ELMER E. TODD, Esq.,
U. S. District Attorney, Federal Building, Seattle, Washington.
Attorney for Plaintiff and Defendant in Error.

G. E. de STEIGUER, Esq.,
New York Block, Seattle, Washington.
Attorney for Defendant and Plaintiff in Error.

In the United States Circuit Court for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PACIFIC CREOSOTING COMPANY,
a corporation,
Defendant.
No. 1826.

COMPLAINT.

Comes now the plaintiff in the above entitled action by direction of the Treasury Department of the United States, and for cause of action against the defendant alleges:

I.

That the defendant is now, and at all times herein mentioned, was a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business at Seattle, Washington.

II.

That on or about the 3rd day of August, 1908, defendant imported into the United States of America from London, in the Kingdom of Great Britain, and entered at the United States Custom House at the Port of Tacoma, two thousand one hundred and eighty-one (2181) iron drums containing creosote. That thereafter on November 27, 1909, said entry was duly liquidated by the Collector of Customs for the District of Puget Sound, and there was found to be due to the plaintiff the sum of Six Thousand Five Hundred and Sixty-seven and 30/100 ($6567.30) Dollars, as duties upon said iron drums, which were of the value of Fourteen Thousand Five Hundred and Ninety-four ($14,594.00) Dollars. Demand was duly made upon the defendant November 27, 1909, for the payment of said duties, and the defendant has failed and refused to pay said sum of $6567.30, or any part thereof.

And for second cause of action against the defendant, plaintiff alleges as follows:

I.

That the defendant is now, and at all times herein mentioned, was a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business at Seattle, Washington.

II.

That on or about the 29th day of August, 1908, defendant imported into the United States of America from London, in the Kingdom of Great Britain, and entered at the United States Custom House at the Port of Tacoma, one thousand (1000) steel drums, and four hundred and eighty-two (482) steel barrels, all containing creosote. That thereafter on November 27, 1909, said entry was duly liquidated by the Collector of Customs for the District of Puget Sound, and there was found to be due to the plaintiff the sum of Four Thousand Four Hundred and Sixty-two and 65/100 ($4462.65) Dollars, as duties upon said steel drums and steel barrels, which were of the value of Nine Thousand Nine Hundred and Seventeen ($9917.00) Dollars. Demand was duly made upon the defendant November 27, 1909, for the payment of said duties, and the defendant has failed and refused to pay said sum of $4462.65, or any part thereof.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of Eleven Thousand and Twenty-nine and 95/100 ($11,029.95) Dollars, with interest at the rate of six per cent (6%) from November 27, 1909, together with its costs and disbursements herein.

ELMER E. TODD,
United States Attorney.

Indorsed: Complaint. Filed U. S. Circuit Court, Western District of Washington, Feb. 5, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff.
vs.
PACIFIC CREOSOTING COMPANY,
a corporation,
Defendant.
No. 1826.

ANSWER.

Now comes the defendant and for answer to the alleged first cause of action set forth in the complaint herein:

I.

Admits the allegation in Paragraph I. thereof.

II.

Referring to Paragraph II. thereof, this defendant denies that said entry was ever liquidated at any time after the 15th day of September, 1908, and denies that there was ever found, upon liquidation thereof, to be due to the plaintiff from the defendant the sum of Six Thousand Five Hundred Sixty-seven and 30/100 ($6567.30) Dollars as duties upon said iron drums, or any sum whatsoever, and denies that there was due thereon as duties any sum whatsoever.

And further and by way of an Affirmative Defense to said alleged first cause of action, this defendant alleges:

I.

That more than one year prior to November 27, 1909, and more than one year prior to the alleged and attempted liquida-

tion referred to in Paragraph II. of said alleged first cause of action said drums were entered and were passed free of duty by the Collector of Customs for the District of Puget Sound, and delivered to this defendant, being the owner and the importer thereof.

And further and for a second Affirmative Defense to said first cause of action, defendant alleges:

I.

That said iron drums referred to therein were usual articles and forms of covering and holding the creosote imported therein, and were not designed for use otherwise than in the *bona fide* transportation of such creosote to the United States.

And further and for answer to the alleged second cause of action set forth in the complaint, this defendant

I.

Admits the allegations of Paragraph I.

II.

Referring to Paragraph II. thereof, this defendant denies that said entry was ever liquidated at any time after the 11th day of October, 1908, and denies that there was ever found, upon liquidation thereof, to be due to the plaintiff from the defendant the sum of Four Thousand Four Hundred Sixty-two and 65/100 ($4462.65) Dollars, as duties upon said steel drums and steel barrels, or either thereof, or any sum whatsoever, and denies that there was due thereon as duties any sum whatsoever.

And further and by way of an Affirmative Defense to said alleged second cause of action, this defendant alleges:

I.

That more than one year prior to November 27, 1909, and more than one year prior to the alleged and attempted liquidation referred to in Paragraph II. of said alleged second cause of action said drums and barrels were entered and were passed free of duty by the Collector of Customs for the District of Puget Sound, and delivered to this defendant, being the owner and the importer thereof.

And further and for a second affirmative defense to said second cause of action, defendant alleges:

I.

That said steel drums and steel barrels referred to therein were usual articles and forms for covering and holding the creosote imported therein, and were not designed for use otherwise than in the *bona fide* transportation of such creosote to the United States.

G. E. de STEIGUER,
Attorney for Defendant.

United States of America,
Western District of Washington,
Northern Division.—ss.

H. R. Rood, being first duly sworn, deposes and says: That the defendant making the foregoing answer is a corporation and affiant is its Vice-President and Manager and verifies this answer for that reason; that he has read this answer, knows the contents thereof and believes the same to be true.

H. R. ROOD.

Subscribed and sworn to before me this 18th day of April, 1910.

(Seal) R. E. THOMPSON, JR.,
Notary Public in and for the State of Washington, residing at Seattle.

Service of the within Answer by delivery of a copy to the undersigned is hereby acknowledged this 18th day of April, 1910.

ELMER E. TODD,
United States Attorney.

Indorsed: Answer. Filed U. S. Circuit Court Western District of Washington, Apr. 18, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PACIFIC CREOSOTING COMPANY,
a corporation,
Defendant.
No. 1826.

DEMURRER TO ANSWER.

I.

Plaintiff demurs to the affirmative defense of the defendant to the first cause of action set out in the complaint for the reason that it appears on the face of said affrmative defense that it does not state facts sufficient to constitute a defense to said first cause of action.

II.

Plaintiff demurs to the second affirmative defense of the defendant to the first cause of action set out in the complaint, for the reason that it appears on the face of said second af-

firmative defense that it does not state facts sufficient to constitute a defense to said first cause of action.

III.

Plaintiff demurs to the affirmative defense of the defendant to the second cause of action set out in the complaint for the reason that it appears on the fact of said affirmative defense that it does not state facts sufficient to constitute a defense to said second cause of action.

IV.

Plaintiff demurs to the second affirmative defense of the defendant to the second cause of action set out in the complaint, for the reason that it appears on the face of said second affirmative defense that it does not state facts sufficient to constitute a defense to said second cause of action.

ELMER E. TODD,
United States Attorney.

The United States of America,
Western District of Washington.—ss.

I hereby certify that I am the attorney for the plaintiff in the above entitled cause for action; that I have read the above demurrer and that in my opinion the same is well founded in point of law.

ELMER E. TODD,
United States Attorney.

Received a copy of the within Demurrer this 21st day of April, 1910.

G. E. de STEIGUER,
Attorney for Deft.

Indorsed: Demurrer. Filed U. S. Circuit Court, Western District of Washington, Apr. 21, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PACIFIC CEROSOTING COMPANY,
a corporation,
Defendant.
No. 1826.

ORDER WITH REFERENCE TO DEMURRERS AND ANSWER.

This day came on for hearing the demurrers of the plaintiff to the affirmative defenses set forth in the answer herein, the parties appearing by their respective attorneys. After argument of counsel the Court

1. Overrules the demurrer to the first affirmative defense to the first cause of action.

2. Sustains the demurrer to the second affirmative defense to the first cause of action.

3. Overrules the demurrer to the first affirmative defense to the second cause of action.

4. Sustains the demurrer to the second affirmative defense to the second cause of action.

Done in open court this 2nd day of May, 1910.

C. H. HANFORD, Judge.

Plaintiff excepts to the order of the Court overruling the demurrer to the first affirmative defense to each cause of action and said exception is allowed.

C. H. HANFORD, Judge.

Indorsed: ORDER WITH REFERENCE TO DEMURRERS AND ANSWER. Filed U. S. Circuit Court, Western District of Washington, May 2, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PACIFIC CREOSOTING COMPANY,
a corporation,
Defendant.
No. 1826.

REPLY.

Comes now the plaintiff and for reply to the answer of the defendant herein, alleges as follows:

I.

Replying to the first affirmative defense to the first cause of action pleaded in the complaint, plaintiff denies that more than one year prior to November 27, 1909, and more than one year prior to the liquidation referred to in paragraph 2 of the complaint, or at any time, said drums were passed free of duty by the Collector of Customs for the District of Puget Sound.

II.

Replying to the first affirmative defense to the second cause of action pleaded in the complaint, plaintiff denies that more than one year prior to November 27, 1909, and more than one year prior to the liquidation referred to in paragraph 2 of the second cause of action in the complaint, or at any time, said drums and barrels were passed free of duty by the Collector of Customs for the District of Puget Sound.

WHEREFORE, having fully replied, plaintiff prays as in its complaint.

ELMER E. TODD,
United States Attorney.

Received a copy of the within Reply this 3rd day of May, 1910.

G. E. de STEIGUER,
Attorney for Defendant.

Indorsed: REPLY. Filed U. S. Circuit Court Western District of Washington, May 3, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington.

UNITED STATES OF AMERICA,
vs.
PACIFIC CREOSOTING COMPANY. } No. 1826.

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff and assess its damages at the sum of ($12,077.62) Twelve Thousand and Seventy-seven and Sixty-two One Hundredths Dollars in obedience to the pre-emptory instruction of the Court to so find.

W. C. BENTLEY, Foreman.

Indorsed: VERDICT. Filed U. S. Circuit Court Western District of Washington, Jun. 28, 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

United States Circuit Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PACIFIC CREOSOTING COMPANY,
a corporation,
Defendant.
No. 1826.

JUDGMENT.

This cause came on for trial on this 28th day of June, 1911, before the above entitled court and a jury duly empaneled and sworn to try said cause, and evidence having been introduced both on behalf of the plaintiff and on behalf of the defendant, upon the motion of the plaintiff the court instructed the jury to return a verdict in favor of the plaintiff in the sum of Twelve Thousand Seventy-seven and 62/100 Dollars ($12,077.62), and said verdict was accordingly returned by the jury; wherefore, by virtue of the aforesaid premises;

IT IS ORDERED, ADJUDGED AND DECREED, That the plaintiff have and recover from the defendant the sum of Twelve Thousand and Seventy-seven and 62/100 Dollars ($12,077.62), with its costs and disbursements herein.

To the above judgment and each and every part thereof the defendant prays an exception, which is allowed.

C. H. HANFORD, Judge.

Indorsed: JUDGMENT. Filed U. S. Circuit Court Western District of Washington, June 30, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PACIFIC CREOSOTING COMPANY,
a corporation,
Defendant.
No. 1826.

PETITION FOR NEW TRIAL.

Now comes the defendant, Pacific Creosoting Company, a corporation, and petitions the court to set aside the verdict rendered herein under instructions of the court on the 28th day of June, 1911, and the judgment entered thereon against the defendant on the 29th day of June, 1911, and to order a new trial of said cause, for the following causes:

I.

Errors in law occurring at the trial.

II.

Insufficiency of the evidence to justify the verdict and insufficiency of the evidence to justify the instructions of the court to render such verdict.

The errors relied upon by this defendant in support of this petition are as follows:

1. The admission by the court in evidence, over defendant's objection, of plaintiff's Exhibit "E," being a protest filed by the defendant against one of the purported liquidations referred to in the complaint.

2. The admission in evidence, over defendant's objection, of plaintiff's Exhibit "F," being a protest made by the defendant against one of the purported liquidations referred to in the complaint.

3. The admission in evidence, over defendant's objection, of the testimony of Henry Blackwood stating that the action of the office of the collector of Puget Sound as to classification of the goods referred to in the complaint was suspended.

4. The admission of the testimony of the witness, Henry Blackwood, over defendant's objection, as to what conclusion was reached by the said collector as to the classification of the goods in question.

5. The admission of the testimony of the witness, Henry Blackwood, over the objection of the defendant, construing the statement of F. C. Harper, collector, as to the goods in question having been entered and passed free of duty more than one year previous to the date of said letter.

6. The refusal of the court to direct a verdict for the defendant.

7. The refusal of the court to direct a verdict for the defendant as to the first cause of action.

8. The refusal of the court to direct a verdict in favor of the defendant as to the second cause of action.

9. The giving by the court to the jury pre-emptory instruction to render a verdict in favor of the plaintiff.

The defendant further says that said evidence was insufficient to justify the verdict or the instructions of the court for the following reasons:

(a) Because it was conclusively established that the goods, wares and merchandise, upon which duties were claimed in the complaint, had been entered and passed free of duty, and said goods, wares and merchandise delivered to the owner and importer more than one year prior to the purported liquidation referred to in the complaint; or if such evidence was not con-

clusive, then there was evidence clearly tending to show such fact.

G. E. de STEIGUER,
Attorney for Defendant.

Service of the within Petition for New Trial by delivery of a copy to the undersigned is hereby acknowledged this 29th day of July, 1911.

ELMER E. TODD,
Attorney for Plaintiff.

Indorsed: PETITION FOR NEW TRIAL. Filed U. S. Circuit Court, Western District of Washington, Jul. 29, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

United States Circuit Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PACIFIC CREOSOTING COMPANY,
a corporatioon,
Defendant.

No. 1826.
Filed Aug. 17, 1911.

MEMORANDUM DECISION ON PETITION FOR A NEW TRIAL.

This is an action to collect duties on imported drums containing creosote oil. The case was tried by the court and a jury upon the theory that no question was in issue with respect to the amount of the duties to which the drums were subject, the decision of the case hinging upon an affirmative defense pleaded

in the answer, the substance of which is that the drums were entered and passed free of duty, and delivered to the importers in the month of August, 1908, and no demand for payment of duty having been made until the month of November, 1909, the action is barred by an act of Congress prescribing the period of one year from the date of entry and delivery as the limit of time within which the right to assess duties may be exercised. Pierce's Fed. Code, Sec. 5553; 18 U. S. Stat. 190; 2 F. S. A. 760; Comp. Stat. 1901, p. 1986.

There is no question of fraud involved and the actual controversy to be determined is whether the drums were in fact entered and passed free of duty. The Court granted a motion to instruct the jury peremptorily to render a verdict in favor of the government for the amount sued for, which was done.

Having considered the petition for a new trial and the arguments of counsel and reviewed the evidence preserved in the bill of exceptions, it is the opinion of the Court now that, the burden rested upon the defendant to prove by a fair preponderance of the evidence that the drums were "entered and passed free of duty" and delivered, pursuant to an actual decision of the collector that they were not subject to duty; and no evidence, tending to prove that such a decision was ever made, was introduced or offered. Evidence was introduced in behalf of the government tending to prove that the entry was held in suspension and not completed, pending an investigation to determine whether the drums were unusual coverings subject to duty, and that they were not by any act of the collector passed free of duty. While the entry was in suspension and not completed, the bar of the statute of limitations did not become effective. The law does not prescribe any limitation of time within which the collector can be required to liquidate duties on imported merchandise subject to duty. *Abner Doble Co. v. United States,* 119 Fed. Rep. 152.

Motion denied.

C. H. HANFORD,
United States District Judge.

Indorsed: MEMORANDUM DECISION on Petition for a New Trial. Filed U. S. Circuit Court, Western District of Washington, Aug. 17, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PACIFIC CREOSOTING COMPANY, a corporation,
Defendant.
No. 1826.

ORDER DENYING MOTION FOR NEW TRIAL.

The defendant's motion for a new trial herein came on regularly for hearing on the 7th day of August, 1911, the plaintiff appearing by its attorney, Elmer E. Todd, and the defendant by its attorney, George E. de Steiguer.

The Court, after hearing argument of counsel, took said matter under advisement, and now, being fully advised in the premises, denies said motion, to which ruling of the Court the defendant excepts and its exception is allowed.

Dated this 21st day of August, 1911.

C. H. HANFORD, Judge.

O. K. as to form.

ELMER E. TODD.

Indorsed: ORDER DENYING MOTION FOR NEW TRIAL. Filed U. S. Circuit Court Western District of Washington, Aug. 21, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court for the Western Division of Washington, Northern Division.

Before the HONORABLE CORNELIUS H. HANFORD, Judge, and a Jury.

UNITED STATES OF AMERICA, *Plaintiff,* vs. PACIFIC CREOSOTING COMPANY, a corporation, *Defendant.*	No. 1826. CIVIL.

DEFENDANT'S BILL OF EXCEPTIONS.

AND BE IT REMEMBERED, that thereafter and on said June 28, 1911, at 2 o'clock p. m., after the jury was duly and regularly empaneled as aforesaid, counsel for the parties respectively made their opening statements to the court and jury of the issues to be determined in said cause, whereupon the United States, to maintain said issues upon its part introduced the following evidence, and the following proceedings were had, to-wit:

JOHN A. PLUM, witness called on behalf of the plaintiff and duly sworn, testified as follows on

DIRECT EXAMINATION.

BY ELMER E. TODD (District Atty.):

Q Captain, state your position in the Custom's service?
A Deputy Collector, sir.
Q What do you have to do with the liquidation of entries?
A I have the supervision of liquidation.
Q Where?

A At Port Townsend.

Q Those entries come to you from the other sub-ports to Port Townsend to be liquidated?

A Yes sir.

Q Have you the custody of the papers showing the entries at the Port Townsend office?

A All the entries are in my custody there, yes sir.

Q In making those entries, how many papers are made out?

A We receive two copies of the statement form of entries besides the invoice, bills of lading, and their returns when necessary.

Q What—does the deputy collector of the sub-port keep any copies?

A Yes sir.

Q What do you do with the two copies you receive?

A After the liquidation we send one of them to the Auditor for the Treasury Department, and retain the other in the files of the office.

Q They are all copies—exactly the same?

A Yes sir; up to the time of their liquidation they are, yes sir.

Q Well, what do you mean by that—at the time of liquidation what change is made in them?

A Well, the copy in the sub-port doesn't have the official stamp on it.

Q I show you herewith an "Entry for Consumption." State whether you have seen that paper before?

A Yes sir, I have.

Q Beg pardon sir?

Q What is it?

A It's one copy of a consumption entry.

Q From the files of your office?

A Yes sir.

Q What does your office put on that at the time of liquidation?

A We put on the red ink note at the foot, together with the date, and the initial of the officer who made the calculation.

MR. TODD: The Government desires to offer this in evidence as Plaintiff's Exhibit "A."

MR. de STEIGUER: (for Defendant): As to these matters we wish them to go in, without of course conceding their legal effect. We do not wish to argue that matter now.

THE COURT: Very well, they may be admitted.

"Entry for Consumption" sheet admitted and by the Clerk marked Plaintiff's Exhibit "A." True copy of which is hereto attached.

MR. TODD: Now I show you herewith another entry.

A Yes sir, I recognize that as taken from the files.

Q Part of the official records of your office?

A Yes sir.

Plaintiff offers the paper in evidence, and the same is admitted by the Court with the same understanding as to Exhibit "A," and marked Plaintiff's Exhibit "B," true copy of which is hereto attached.

Q Referring now to Plaintiff's Exhibit "A," the Frank P. Dow Company, incorporated, appears to be the importer; does it show on whose behalf he was acting?

MR. de STEIGUER: We are willing to concede, Mr. Todd, that they acted for the Pacific Creosoting Company.

A The note recites generally that they so acted.

MR. TODD: At the time this was liquidated, were you at Port Townsend?

A No sir.

Q Who was the liquidating officer in your absence?

A Mr. Charles Wilkinson had charge of the office in my absence.

Q The liquidating is always done at the Collector's office in Port Townsend?

A Yes sir.

MR. de STEIGUER: We object to that; it is a conclusion of law as to where the liquidating is done.

THE COURT: Well, he may state what the practice is. That will not be determinative of the law, in all events.

MR. TODD: I will withdraw the question for the moment. And I will ask you what are the different steps in liquidation?

A The different steps in liquidation—they ascertain the amount of the duty, and the correct classification—

Q Who makes the final ascertainment?

A The Collector's office.

Q Where?

A At Port Townsend.

Q You admit, I believe, Mr. de Steiguer, that there is no Naval officer in this Customs district?

MR. de STEIGUER: I admit there was no Naval officer; I don't know about an appraiser—no official appraiser I think.

MR. TODD: That is, nobody that goes by that title.

MR. de STEIGUER: Yes sir.

THE COURT: Tell the jury what inquiry or investigation is made to classify and liquidate. I say tell the jury—explain to the jury how you get at the data—what inquiry and investigation do you have to make?

A Well, the first step is to ascertain the correct classification; and the next procedure is to make your calculations, using the rate of duty applicable in that case, and determine the amount of money which would accrue on that entry. If we find the money paid in excess, we refund it to the importer, and if it is short we ask the importer to pay, as in this instance.

Q Well now, in fixing the amount of duty, where it depends on the quality of the goods, you have to ascertain that by assay or examination of the goods, or how?

A In some instances, Your Honor, we do.

Q Well, in some instances; do you ascertain what it is simply on the face of the invoice?

A By examination of the merchandise, first in the hands of an examiner authorized for such purpose, and his advisory classification is noted thereon. If found correct by the Collector's office, the liquidation will proceed; if it is found in-

correct, it will be referred back with suggestion towards amendment, and the entry will not be liquidated unless the correct classification is entered thereon.

Q Now for the purpose of liquidating the duty on metal drums that creosote is transported in, how do you get at that?

A The value of the drums is shown on the invoices, and they will be liquidated as unusual coverings.

THE COURT: I am through.

CROSS EXAMINATION.

BY MR. de STEIGUER:

Captain, when the goods are entered free of duty they are delivered at once to the importer, are they not?

A If the goods are free of duty by law, yes sir.

Q And that's not only the law, but the practice?

A True, yes sir.

Q On the other hand, if they are assumed to be dutiable, they are held until either the duty is paid, or a bond put up for the payment of the duty?

A That depends, in a measure, upon who the importer is. If the importer is reliable, goods are frequently released and the further collection of duty is left to the integrity of the importer.

Q Well, do you mean to say that if the importer is reliable you release the goods without determining—if they are dutiable, without ascertainment of the duty whatever?

A There is no bond that can be given for the payment of duty.

Q Under no circumstances?

A Not that I am aware of.

Q Are the goods ever—is it the practice to release the goods, if they are dutiable, without any payment of duty whatsoever, and without any security?

A It is not the practice, no sir.

Q Now I show you Plaintiff's Exhibit "A," and I will ask you if that exhibit was not all made out and filed practically

on its date, August 2nd, 1908, except the red ink notation at the bottom?

A The natural presumption is that it was, yes sir.

Q Yes. Now what is that red ink notation at the bottom; I wish you to read that into the record so we can segregate that from the rest of it.

A Shall I read it?

Q Yes, just read that so it will be separate.

A (Reading from exhibit "A") "$14,594.00 at 45%, $6567.30; Increased Duty, $6567.30; Liquidation, November 27, 1909—N. W. O."

Q So that this notation above, "900 Drums Creosote—Free—" I am omitting some of the intermediate columns—

A Yes sir.

Q "1000 drums Creosote,—Free;" "281 Drums Creosote—Free" as you would judge from the practice of the department, were made out on or about August 2nd, 1908?

A As per date shown.

Q And the other notation about the increased duty amounting to $6567.30 was put in about November 27th, 1909?

A Yes sir.

Q I will now take up Exhibit "B." On that exhibit the notation at the bottom in red ink about increased duty, liquidated November 27 amounting to $4462.65, you would say was endorsed thereon November 27th, 1909?

A Yes sir.

Q The date of liquidation?

A Yes sir.

Q And the entries "1000 Drums Creosote—Free," "482 barrels Creosote"—and do you know what that is there, Captain? (indicating on said exhibit).

A That's the total number of packages.

Q Then the "482 Barrels Creosote—Free" were made out about the date of the entry, August 29, 1908?

A Yes sir.

MR. de STEIGUER: That's all.

RE-DIRECT EXAMINATION.

BY MR. TODD:

I understood, Captain, that the figures on this entry are made out by the importer, or by the importer's broker?

A Yes sir.

Q Except the entry in red ink?

A Yes sir.

Q Now what was the practice at a sub-port where the examining officer estimates the importation to be free of duty—what is the practice as to delivery?

A Well, if the merchandise is free by law, delivery is made.

Q Well, if he estimates it to be free of duty at the sub-port, he then delivers it?

A Yes sir, in that case, yes sir.

Q What report would he make to the Collector?

A He would make his report in the usual way, by submitting copies of the entries and invoices.

Q Is the action of the examining officer at a sub-port final?

A No sir.

MR. de STEIGUER: We object to that as purely a conclusion of law.

THE COURT: The objection is sustained.

MR. TODD: That is all.

RE-CROSS EXAMINATION.

BY MR. de STEIGUER:

Captain, the general practice is to hold goods, if they are dutiable, until the duty is paid?

A If it is known at the time they are dutiable, yes sir.

Q Well, if they are deemed to be dutiable?

A Well, that depends upon whose judgment you had to call upon.

Q Well, if the officer having the matter in charge holds them dutiable, he holds them?

A If he deemed them dutiable and knew them to be dutiable he would hold them, yes.

Q That is all.

THE COURT: I will instruct the jury on that point, that if the stock be dutiable and is passed, the acts of the Collector or acting Collector are final unless proper steps are taken within the legal time to review his action, by competent authority—superior authority—or upon his own motion.

MR. TODD: I assume that the Court will take judicial notice of the Customs Regulations in force at the time of this importation?

THE COURT: Yes sir.

MR. TODD: Then I would like to read Customs Regulation No. 1037, for the purpose of reference in case of the witness who is to follow.

THE COURT: Very well.

Whereupon said regulation was read by the District Attorney. True copy whereof is hereto attached.

CHARLES WILKINSON, witness called on behalf of Plaintiff, being first duly sworn, testified as follows on

DIRECT EXAMINATION.

BY MR. TODD:

Your name is Charles Wilkinson?

A Yes sir.

Q And your official position in the Customs Service is what?

A Deputy Collector and clerk.

Q What duties do you have in regard to liquidation of entries?

A Well, particularly to liquidate all of the entries in the District outside of Consumption Entries, and in the absence of Capt. Plum I have supervision of the entire liquidation of the office—of the District.

Q I show you Consumption entry District No. 1722—

MR. de STEIGUER: Is it designed to prove anything else except so far as he acted at the time he liquidated these entries?

MR. TODD: Yes sir.

MR. de STEIGUER: We concede that, barring the question of his right to do so.

MR. TODD: That is, you concede the entries were liquidated at the time shown?

MR. de STEIGUER: No, I say barring the fact that you had the right to liquidate, I don't care to have you make the formal proof. It is just a question whether you had a right to liquidate.

MR. TODD: Q Under whose direction were the records of liquidation as called for in Article 1037 of the Customs Regulations kept?

A Kept under my direction.

Q What is this book which I show you?

A That's the record of liquidation of entries.

Q Kept under your direction?

A Yes sir.

Q Will you turn to Consumption Entry District No. 906 (showing to counsel). Just state to the jury what that record in a general way shows—what do the different columns show?

A The record shows the name of the vessel; from whence the vessel came; the date the vessel arrived; the name of the importer of the merchandise; the date the merchandise was entered; the sub-port number; number of consumption entry; also the District number of the consumption entry; a column for the estimated duty; a column for the liquidated duty; a column for additional duty, excess duty; the date of liquidation, and when the amount of increased duty was paid or the amount of excess duty refunded.

Q Now turning to that record, referring to Consumption Entry No. 906, will you read off the different statements of those different columns as to that entry?

A (Reading) "Name of vessel, OANFA; arrived, from Yokohama August 2nd, 1908; Frank P. Dow & Co., Incorporated,"—

Q What's that, the importer?

A That's the name of the importer. "Date of entry, August

3rd, 1908," the first date was the date of the arrival of the vessel. "Sub-Port No. 81-A."

Q Please explain what "A" refers to?

A The different sub-ports are designated by letters; for instance, A, B, C, D for Seattle, Tacoma—

Q What does "A" refer to?

A That's the sub-port of Tacoma.

Q Read the next column.

A "906,"—the District number; "Estimated Duty," blank; "Liquidated Duty, $6567.30; Additional Duty,"—this should show, this column shows additional and liquidated duties. This is really an increased duty of $6567.30, "Liquidated—" "liquidated November 27, 1909."

Q That completes the record as to that?

A With the exception of the column "When Paid," which shows that it has not been paid.

Q What does that record show in case goods are entered and estimated free of duty; what action is then taken at the Collector's office?

A When they are entered free of duty?

Q Yes?

A Well, up to the time of the liquidation of the entry it shows that there was no estimated duty collected.

Q What entry is made on that book if the Collector's office upon a report of it, passes them free of duty?

A No further entry is made, except there is nothing placed in the column of "Estimated Duty."

Q What is placed under the "Liquidated" column?

A At the time of the liquidation of the entry the amount of money ascertained to be due is placed in the column of "Liquidated Duties."

Q I mean if they are passed free of duty?

A Then the words, "As Entered."

Q Have you one of them there?

A The first one, yes sir.

Q That is, under the column "Liquidated Duty," the words "As Entered?"

A Yes sir. This shows no estimated duties; this is free.

Q And it means it was liquidated free as entered?

A Yes sir, free as entered.

Q Do you want to examine this (handing to counsel). Now turning to consummation entry No. 1722, will you read the record on your record as to that?

A (Reading) "Name of vessel, Bellaraphon; Whence Arrived, Yokohama; Date of Arrival of Vessel, August 29, 1908; Importer, Pacific Creosoting Co.; Date of Entry, August 29, 1908; Consumption Entry No. 147-A, District No. 1722." Then there is nothing in the estimated duties column. "Liquidated Duty, $4462.65; Increased Duty, $4462.65; Date of Liquidation, November 27, 1909."

Q Mr. Wilkinson, when, in the column of "Estimated Duty" there appears only a blank, what does that mean?

A It means the goods were free of duty, or supposed to be at the time the entry was made.

Q That is, by the examining officer at the sub-port?

A Yes sir.

Q That column refers, then, to the way that the importer declared his goods?

A The way the importer entered the goods.

Q Mr. Wilkinson, do you in the performance of your duties have any reports to make to the Treasury Department as to the entry of goods, or as to liquidation?

A The report is made to the Treasury Department by forwarding the liquidation entry, together with the invoice, to the Auditor for the Treasury Department.

Q When is an entry forwarded with reference to the time of the liquidation?

A About from the tenth to the twentieth of the month succeeding the liquidation of the entry.

Q In case an entry covered in a liquidation is suspended, what report do you make?

A At the time the entries are forwarded to the Department; the entries for a certain month are forwarded to the Department as liquidated, and those that are suspended are reported on a pink slip.

Q With reference to these two entries, District No. 906 and No. 1722, the month succeeding the report of those entries what—from the sub-port what do you send in to the Treasury Department?

A (By Mr. de Steiguer) Have you the reports he made?

MR. TODD: Have you the reports you sent in?

A There is no record kept of that.

Q Yes, the report is sent to the Treasury Department?

A There is no actual report sent; the entries themselves are forwarded to the Department and in place of the entries they ordinarily file a pink slip, which is put in their place.

Q With reference to these two entries in question, what was the month succeeding the report from the sub-port?

A The pink slips were filled out and placed in the bundle sent to the Department—

Q Have you those?

A I have not—the ones sent to the Auditor.

Q Can you produce a copy of them?

A Yes sir, I can produce an exact copy.

Q A copy such as was sent to the Auditor for the Treasury?

A Yes sir.

Q Is that a copy kept on record there, or one made for the purpose of illustration as to the one that was sent?

A One that was made—

Q Do you know whether or not printed slips were sent with regard to these entries?

A Yes sir.

MR. de STEIGUER: Did you send them yourself?

A Yes sir.

MR. TODD: And those pink slips would now be at the Treasury Department, where they are kept?

A Yes sir.

Q I show you now these two pink slips: State what those purport to be copies of, or what they are copies of?

A Of the slips that were sent to the Auditor in place of the entries (handed to opposing counsel for examination).

Q Now wherein do those furnish information to the Auditor for the Treasury Department as to the *status* of that entry?

A Those are designed by the Treasury Department for that purpose, to show that the entry is withheld for a certain purpose. There is a stamp put on here (indicating) and this part struck out, showing the entry is held in the District of Puget Sound, awaiting completion.

Counsel for the Government offers the two slips in evidence and asks that they be marked Plaintiff's Exhibit "C."

MR. de STEIGUER: I don't think they have any legal effect. I have arranged with Mr. Todd that we would not object to this as secondary evidence. We have no objection to them being filed, and will argue their effect later.

THE COURT: They may be received.

Marked by the Clerk Plaintiff's Exhibit "C," true copy of which is hereto attached.

MR. TODD: When were the entries in this case sent to the Auditor for the Treasury Department?

A May I see that book?

Q Certainly (handing to witness).

A October tenth, nineteen hundred—

Q No—when were these entries, in this case?

A O, these entries?

Q Yes, these entries.

A These entries were sent from the 10th to the 15th of December, 1909.

Q In the usual course of business after liquidation?

A Yes sir, in the usual course of business.

Q The date, October 10th which you referred to, was the date what was sent?

A The date October 10th, 1908, was the date that the Aug-

ust entries, the general roll of entries for August, 1908, were forwarded to the Auditor for the Treasury Department.

Q And with reference to these, what was sent?

A The pink slips.

MR. TODD: That is all.

CROSS EXAMINATION.

BY MR. de STEIGUER: They were sent on or about fifteen months after the entry of the goods?

A No sir.

Q I thought you said they were sent about December, 1909?

A No sir; the entries themselves were sent at that time.

Q When were the pink slips sent on?

A The 10th of October, 1908.

Q O, October, 1908. Should not those be sent, according to the regulations, by the tenth of the following month?

A The tenth of the following month after the liquidation of the month's entries. Now the entries were made in August; they were not liquidated until September.

Q None of the entries?

A None of the August entries were liquidated until September; then they were due to go to the Auditor for the Treasury Department the 10th of October.

Q And this book that you testified in reference to, containing the record of entries, as I understand it if goods are simply passed free of duty no entry is made under that column?

A Why, the regular consumption entry is made for all goods whether they are passed free or whether they are free of duty.

Q What I mean to say is, if they are passed free of duty,—what was the number of that page? (Refers to book.) If they are passed free of duty there is no entry made under the "Liquidated Duty" item?

A Formerly we had a stamp we put on there "Free as Entered by the Importer," before the goods were passed on by the Customs Department.

Q Formerly—you mean what, during what period?

A O, seven or eight or ten years ago.

Q After that, you make no entries in that column?

A That seemed unnecessary; we simply drew a line through that space.

Q So if they are passed free of duty you simply make no entry there at all?

A As far as putting any notation, no; only to show there was no particular duty collected at the time of the entry of the goods.

Q Do you keep a copy of those pink slips?

A I do not.

Q How do you know those are correct copies?

A Well, I know I have made them out for about five years now and I know I make them out the same way every time.

Q Then all the slips you make out are the same?

A With the exception if an entry is held up on protest I put a different stamp on.

Q Did you keep a record of the slips sent out that month?

A I did not.

Q How many pink slips did you send out that year do you suppose?

A Well, I might have sent out three or four hundred, and I might have sent out a thousand, and I might have sent out only two hundred—

Q Then you're simply testifying that you think a pink slip sent out because there was no liquidation so far as you call it?

A No.

Q Well how do you know you sent a pink slip?

A Because if I hadn't I would have heard from the Auditor within two months from that time.

Q That's the only reason you know you sent it, because you didn't hear from the Auditor?

A Every time I haven't sent one I have heard from it.

MR. de STEIGUER: That's all.

RE-DIRECT EXAMINATION.

BY MR. TODD: Are the entries dutiable you read from this record here, placed in that record?

A Yes sir.

Q In case the final action is to pass them free, I understand the words "as entered" are entered below the liquidated duty column?

A Yes sir.

Q When are the entries made in the book?

A The original copy of the entry comes to headquarters first, and before the goods are examined; but the same day that it's taken at the sub-port it is mailed to the Port Townsend office and entered up in the regular course of business within a few days.

Q And the entries made at a certain time have serial numbers near each other, then?

A Yes sir.

Q And when are the entries made with regard to liquidation?

A At the time the entry is liquidated.

Q When was the entry in the column under "Estimated Duty" made—in the column "estimated duty?"

A Within a few days after the goods were entered.

Q In what time with reference to examination?

A Well, it may be entered in the book before the examination is made, of the goods.

Q And it may be after too?—you mean?

A Well, of course it is owing to how the work of the office is; if it is—as a general thing it is entered before the goods are examined. It is entered in the sub-port books before examination. In our books, if they are examined the same day they come in, it may not be entered for a day afterwards.

MR. TODD: That is all.

MR. de STEIGUER: That's all.

W. A. FAIRWEATHER, witness called on behalf of Plaintiff, being first duly sworn testified as follows on

DIRECT EXAMINATION.

BY MR. TODD: Your name is W. A. Fairweather?

A Yes sir.

Q And your position in the Custom's Service is what?

A Deputy Collector at the Port of Tacoma.

Q I show you herewith Plaintiff's Exhibit "A," which is Consumption Entry District No. 906; state what you had to do with that entry?

A Personally I had nothing to do with this entry as it is now.

Q What is the practice with reference to one of those entries—how many copies are filed?

A Three copies are presented by the importer to the receiving Deputy at the counter, who checks the entries with the invoice, gives it a number, signs a permit which is also presented at the same time the entry is presented, by the importer. The entry is then passed to the deputy who is acting as cashier. If it is an entry upon which there is an estimated duty, that is. He then passes two copies of the entry and the invoice to the Chief Examiner.

Q Where is the Chief Examiner?

A In the main office—in the principal office at Tacoma.

Q After that what is done with it?

A The invoice is then given by the Chief Examiner to his assistant for the purpose of making examination of the merchandise imported. The permit is held by the Chief Examiner until he has received a report from his assistant.

Q Then what follows?

A After receiving the report, the permit is delivered to the Chief Inspector, and by him given to an Inspector of Customs to go and release the goods.

Q What is done with the entry and the invoice?

A The invoice is then classified by the Examiner; that is, he notes in the terms of the tariff in red ink over each item, his advisory classification, giving the number of the paragraph under which the merchandise may be dutiable, and the rate.

Q After that, what is done with the entry and the invoice?

A The entry then—there is a foot-note made at the foot of the invoice by the Chief Examiner, which is a reference to the Collector of Customs.

Q Well, what is done with the entry and declaration then?

A The entry, the duplicate copy of the entry, together with the invoice having the advisory classification upon it, are sent to the Port Townsend office.

Q To the Collector's office?

A Yes sir, to the Collector's office at Port Townsend.

Q What is this which you hold in your hand, do you know?

A This is a copy of Consumption Entry No. 81-A, which is the sub-port number.

Q Sent from your office?

A Sent from my office to the Collector of Customs at Port Townsend.

Q In the regular course of business?

A In the regular course of business.

Q And this Plaintiff's Exhibit "B" which I now show you, being Consumption Entry Dist. No. 1722, is what?

A Also transmitted to the office of the Collector of Customs.

Q This—Do you know what this is, this paper which I show you?

A This is notice of entry liquidation November 27, 1909.

Q Where was that notice posted, if at all?

A In the Customs House at Tacoma.

Q Is this a part of the records of your office?

A Of the Tacoma Customs Office, yes sir.

Q Is this the notice posted, or a copy?

A That's the original notice posted.

Q And when was it posted?

A On November 29th, 1909.

MR. TODD: We offer this in evidence as Plaintiff's Exhibit "D."

Admitted, and so marked, true copy of which is hereto attached.

CROSS EXAMINATION.

BY MR. de STEIGUER:

Where is the Chief Examiner's office?

A In the general customs office at Tacoma.

Q At Port Townsend?

A The Chief Examiner in this case was at Tacoma.

Q When you said "in the principal office" you meant some part of the office at Tacoma?

A Yes sir, the general office of the Tacoma office.

Q Now it is the practice, is it not, to release the goods upon the report of the Deputy Collector?

A Upon the report of the Deputy Collector?

Q Yes?

A No; upon the report of the examiners.

Q Well, endorsed by the Deputy Collector?

A Yes sir.

Q What? Did you say yes?

A It is the practice to release on the report of the Deputy Collector, yes.

RE-DIRECT EXAMINATION.

BY MR. TODD: You mean the chief examiners at the sub-port of Tacoma—not the Chief Examiner of the District?

A No—the chief examiner of the sub-port of Tacoma.

Q That's all. Now as to the demand—

MR. de STEIGUER: We admit the date of the demand, as alleged in the complaint.

BY MR. TODD:

THE GOVERNMENT RESTS.

AND BE IT FURTHER REMEMBERED that on said date, and after the plaintiff had rested its cause, the defendant, to maintain the issues on its part introduced the following evidence and the following proceedings were had, to-wit:

BY MR. de STEIGUER: (Handing papers to counsel) I presume you don't object to the introduction of those papers?

MR. TODD: No.

MR. de STEIGUER: If Your Honor please, I wish to introduce permit to deliver free goods, dated August 3rd, 1908, signed at Tacoma, Washington, by W. S. Hill, Deputy Collector. I suppose you admit, Mr. Todd, that those are the goods described in one of your causes of action?

MR. TODD: Yes, those are the goods; but I object to the evidence at least as far as the legal effect is concerned, on the ground that it is irrelevant because a permit issued by a Deputy Collector is not a final action—that the act of passing free of duty is an act of the Collector himself at Port Townsend.

THE COURT: Objection overruled. It may be admitted.

To which ruling the Government excepts, and exception is allowed.

Paper marked by the Clerk DEFENDANT'S EXHIBIT No. 1. True copy of which is hereto attached.

MR. de STEIGUER: As this is one of the essential documents, I will read it to the Court. It is labeled "Permit to Deliver Free Goods," and dated at the Tacoma office. (Reading said document.)

Now I also offer in evidence a permit labeled "Permit to land Dutiable Goods," dated Customs House, port of Tacoma, Washington, August 29, 1908 (reading same to Court).

You will concede that this is the merchandise described in your second cause of action?

MR. TODD: Yes, but I wish to preserve the same objection as to Defendant's Exhibit No. 1.

THE COURT: Objection overruled.

Said Permit admitted, and by the Clerk marked DEFENDANT'S EXHIBIT No. 2, true copy of which is hereto attached.

MR. de STEIGUER: That exhibit is also signed by the Deputy Collector, and I think it is by the examiner also (hand-

ing to counsel). Now Mr. Todd, can we agree upon the date when these goods were delivered to the importer?

MR. TODD: They were delivered on or about the date—, no, Mr. Collier the examiner can tell you, I think.

MR. de STEIGUER: I think I asked him. Call Mr. H. E. Stevens.

H. E. STEVENS, witness called on behalf of the defendant, being first duly sworn testified as follows on

DIRECT EXAMINATION.

BY MR. DE STEIGUER:

What is your full name?

A H. E. Stevens.

Q What is your present position with the Pacific Creosoting Company, the defendant herein?

A Secretary.

Q And that was your same position in August, 1908?

A Yes sir.

Q Do you know when the goods on which duty is claimed in this action were taken possession of or delivered by the United States government to the Company?

A About August 3rd, 4th and 5th, and about August 29th.

Q That is, on the goods described in one cause of action about the 3rd, 4th and 5th, and on the other the 29th?

A Yes sir, or a few days after.

Q Was any claim made by the United States government upon your Company for duty on those goods?

A No sir.

Q When was the first claim for duty made upon your Company?

A Some time, I think, in November, 1909.

MR. de STEIGUER: That's all.

MR. TODD: That's all.

ROBERT A. WHITE, witness called on behalf of the defendant, being first duly sworn, testified as follows on

DIRECT EXAMINATION.

BY MR. de STEIGUER: Mr. White, during August, 1908, and ever since, you have been one of the officers of Frank P. Dow & Company, have you?

A Yes sir.

Q And acted with the Pacific Creosoting Company with reference to these importations in this action?

A Yes sir.

Q Was ever any demand made upon you for duties on these importations prior to November, 1909?

A No sir.

Q Was any security asked on your behalf or of the Frank P. Dow Company on behalf of the Pacific Creosoting Company for the payment of duties on these importations?

A No sir.

Q That is all.

CROSS EXAMINATION.

BY MR. TODD: You were the Customs Broker for the Pacific Creosoting Company in this instance?

A Yes sir.

Q And as such you kept track of the liquidation of various entries for which you were the agent?

A At the Port of Tacoma we did not.

Q You have no agent there?

A No sir, no regular agent.

Q You received notice of this liquidation through the mails?

A From Tacoma, as I remember.

Q From the Deputy Collector at Tacoma?

A Yes sir.

Q And thereafter, acting for your clients, you filed a protest did you not?

A Yes sir.

Q This paper which I show you is the protest you filed to one of these entries—which entry is that?

A It is entry 81-A.

Q That is the Tacoma number?

A Yes sir.

Q And that is the paper which you filed on their behalf and as their agent?

A Yes sir.

MR. TODD: We offer this in evidence as Plaintiff's Exhibit "E."

MR. de STEIGUER: We object to it on the ground that it is not proper cross-examination, and has no pertinence to any of the issues in this case.

MR. TODD: It shows by their own admission when the entry was liquidated.

THE COURT: The objection will be overruled.

MR. de STEIGUER: Defendant excepts.

THE COURT: Exception allowed. It may be admitted.

Said Protest marked by the Clerk PLAINTIFF'S EXHIBIT "E," true copy of which is hereto attached.

MR. TODD: This other protest which I now show you, is the protest which you also filed for them on the other entry?

A No. 147-A, yes.

Plaintiff offers said protest in evidence and asks that the same be marked PLAINTIFF'S EXHIBIT "F."

THE COURT: Subject to the same objection and ruling, they may be received and marked.

Second protest marked by the Clerk PLAINTIFF'S EXHIBIT "F," and true copy thereof hereto attached.

MR. TODD: Those protests were never followed up any further were they—never taken before the General Appraisers?

A We had no further connection with them. I couldn't say whether they were followed up by some one else or not.

Q Don't you know, Mr. White?

A I don't know, no sir. We simply filed those.

Q How long did you continue to act for the Pacific Creosoting Company?

A We have acted for them at different times since that time.

Q Frequently—you have had experience, have you not, with liquidations taking place long after the entry was made?

A I cannot recall any.

Q You don't recall any—that's all.

MR. de STEIGUER: That is all. I just want to ask Mr. Stevens one question—just sit where you are, Mr. Stevens—Were you ever asked for any security or did you ever give any security on behalf of your Company for the payment of duties charged?

A No sir.

MR. de STEIGUER:

THE DEFENDANT RESTS.

PLAINTIFF'S REBUTTAL.

HENRY BLACKWOOD, being called on behalf of the Plaintiff and first duly sworn, testified as follows on

DIRECT EXAMINATION.

BY MR. TODD:

State your position in the Customs Service, Mr. Blackwood?

A Special Deputy Collector for the Puget Sound Customs District.

Q Are you familiar with these entries in question?

A Yes sir.

Q Are you familiar with the practice in this Customs District of releasing goods estimated as free of duty at the support of entry?

A Yes sir.

Q What was that practice?

A When an importer presents an entry at the counter which apparently is free of duty and is tentatively entered by him as such, the goods are released without any payment of duty. In some instances the examiner makes a report to the Deputy Collector, and a supplemental deposit is exacted before all of

the goods are released, but that practice is not followed in all cases.

Q In what cases is it not followed?

A In a case where it might be a question of the dutiability of the coverings. For instance, tea is free of duty and a permit for its entry would be granted when the entry was presented at the counter; the goods would be passed except ten per cent. for examination. Now a later examination might disclose the coverings for that tea are unusual, thus subjecting the coverings to duty. If the importer was considered responsible, a special deposit would not be exacted, but the duties would be collected upon the liquidation of the entry as an "increased duty."

Q What has been the length of your experience in this Customs District?

A I entered the service September first, 1897.

Q Now in the case of an entry which is released, the duty having been estimated by the examiner as nothing, what becomes of that entry with reference to the action of the Collector?

A The examiner makes his advisory classification on the invoice; that is referred to the Deputy Collector at the subport where the entry is filed; the Deputy Collector then makes his advisory classification, either changing or accepting the returns of the examiner. The invoice is then forwarded to the Collector of Customs at Port Townsend for acceptance, and is revised by him and either accepted or referred back to the deputy for amendment or revision, and the Collector finally makes his decision as to classification before the entry is liquidated, in some cases accepting and in others rejecting or amending the classification of the sub-port.

Q With reference to the particular entries in question, upon their being sent to the Port Townsend office for action, what action was taken upon them at that time?

MR. de STEIGUER: We object to that, unless he knows.

MR. TODD: If you know?

THE COURT: Objection overruled.

A Those entries were received in August, 1908, and as they covered creosote in iron drums the question of the dutiable classification of iron drums had been under consideration—

Objected to as not responsive to the question, and also on the ground that it is properly evidence in chief.

MR TODD: This is in explanation of what these permits really meant in that case.

THE COURT: (After argument of counsel) The objection is overruled.

MR. de STEIGUER: Defendant excepts.

THE COURT: Exception is allowed.

A (Continuing)—action of the office as to classification of these invoices was suspended and an investigation was undertaken to ascertain the percentage of drums of creosote imported into the United States.

MR. de STEIGUER: This is objected to; the witness is now testifying to a legal conclusion. He says this was suspended in the collector's office. If that is true, there should be some record of it.

MR. TODD: On the other hand they may have done nothing, and then there would be no record.

THE COURT: The objection is overruled.

MR. de STEIGUER: Defendant excepts.

THE COURT: Exception allowed.

A An investigation was undertaken to determine the percentage of creosote imported into the United States in steel drums to ascertain whether or not they were unusual coverings in the opinion of the Collector. That investigation covered a period of three or four months, and as a result the Collector reached the conclusion that steel drums containing creosote was an unusual covering for that class of merchandise, as only a very small percentage of the total quantity of creosote arriving in the United States was contained in packages of that character, and concluded to assess with duty the next importation—

MR. de STEIGUER: We object to him stating the conclusion of the Collector. If he reached a conclusion on that matter there should be some record of it; he cannot testify to a conclusion of law in that way.

Objection overruled.

Defendant excepts—exception allowed.

A (Continuing) He concluded to classify the next importation of steel drums containing creosote as an unusual covering, the steel drum taking the rate of duty of forty-five per cent, and continued to suspend action as to classification of these two importations pending the result of the decision of the General Board of Appraisers, in case protest was filed by the importer upon the importation classified as dutiable.

MR. TODD: Now when you speak of action being suspended, what record have you of that in the Port Townsend office?

A The record is found primarily in the fact that the entries were not liquidated. Action looking to liquidation was suspended—no action was taken. They were placed in the suspense files and left there.

Q When were they taken out of the suspense files, and by whom?

A They were taken out of the suspense files in October, 1909, for the purpose of liquidation, although they had been examined from time to time.

Q Under whose direction were they taken out?

A Under the direction of the Collector, or the Cashier under his instructions in the matter.

Q Now I call your attention to the fact that one of these permits purports to be a permit to land and deliver dutiable goods, and the other to deliver free goods. Is there any special form of permit used in the delivery of goods to the importer?

A These permits were presented by the Broker, who filed the entries at the Customs House, and as they were not regarded as seriously in conflict with his tentative classification

"free of duty," they were accepted. I don't attach any significance to the heading of the permit.

Q They are usually prepared by the importer?

A By the importer, yes sir.

Q Now you speak of a tentative classification—of the importer you mean?

A The importer, yes sir; he entered this consignment as free of duty.

Q Who makes out the entries ordinarily?

A The importer or his broker.

MR. TODD: That is all.

CROSS EXAMINATION.

BY MR. de STEIGUER: After they are made out, they are presented to the Collector or Deputy Collector, are they not?

A Presented with the entry, yes sir.

Q And although they are made out by the importer or his broker, they are endorsed or signed by the Deputy Collector?

A By the office deputy accepting the entry, yes sir.

Q It is not customary, is it, to deliver goods without the payment of any duty if they are held to be dutiable?

A The office deputy accepting the entry is unable, frequently, to determine from the invoice whether goods are dutiable or not, and in some cases an importer makes an entry as though the goods are free of duty and they are thereafter liquidated dutiable.

Q How long, did you say, you have been connected with the Customs Service in this District?

A September 1, 1897.

Q Now drums—drums and barrels of the character referred to in these proceedings had been imported repeatedly during that period, had they not?

A In the latter part of that period only.

Q There had been a great many shipments before this shipment—before either of these shipments?

A There were some, yes sir.

Q All of them were admitted free, were they not?

A In this District?

Q Yes?

A Prior to these importations I think they were, yes sir.

Q Well, they were all admitted—there was no assessment of duty upon any of those drums or barrels, until long after the importation of these goods, were there?

A The first assessment of duty in this District on these drums as unusual coverings, was in November, 1908, I think.

Q That was several months after the importation of these barrels and drums of course?

A The assessment in November, 1908, was made under an investigation which began at the time these two lots were imported.

Q Those goods were imported after the goods were imported which are the subject-matter of this action, were they not?

A The goods liquidated in November arrived here after the August goods, yes sir.

Q In other words, the goods arriving in August, 1908, you didn't liquidate until November, 1909; but you did liquidate about November, 1908, goods which arrived after these goods?

A Yes sir.

Q I understood you to say that when goods come in which are free in themselves, but which have a covering which may be dutiable, it is the custom of the office to retain a certain per cent. as securing the payment of the duty on the covering?

A No sir, I did not so testify.

Q Well, what did you say on that subject?

A I said that ten per cent. of the importation is reserved to the appraiser's store, and an examination there may disclose that the coverings are dutiable, which the deputy could not know at the date of the acceptance; and the importation may be released without collecting that duty, which would then be assessed when the entry was liquidated.

Q Well, it is the custom to take some steps to protect the

payment of the duty on the entry, is it not—if any part of it is found to be dutiable?

A Supplemental deposits are frequently taken; but where it is a question of assay or expert examination or analysis to determine whether the goods are dutiable or not, the classification is subject to that examination or investigation; and in this case it was subject to investigation as to whether or not these drums were unusual coverings in the opinion of the Collector's office.

Q When did that investigation begin?

A August, 1909,—1908.

Q What part of August, 1908?

A August 7th, 1908—although there had been some examination made prior to that time, but not so general as the investigation that commenced in August, 1908.

MR. de STEIGUER: That is all.

MR. TODD: That's all.

W. A. FAIRWEATHER, recalled by the Plaintiff in rebuttal, testified as follows on

DIRECT EXAMINATION.

BY MR. TODD:

These permits, Defendant's exhibits numbers 1 and 2, were issued from your office?

A Yes sir.

Q And signed by whom?

A Signed by M. S. Hill, Deputy Collector.

Q Who is he?

A Deputy in the office at Tacoma.

Q At what desk?

A He is at the receiving desk.

Q Just explain how one of these permits purports to be for dutiable goods, and the other for free goods?

MR. de STEIGUER: We object to that, in the first place, because they speak for themselves. In the second place, it is not shown that the witness has any knowledge on the subject.

Objection overruled.

Defendant excepts—exception allowed.

A The merchandise covered by these two permits was entered by the importer as being free of duty. The permits were prepared by the importer or his broker, and presented with the entries. I cannot explain why the importer allowed these to land as dutiable goods—it is simply an error of the party who made up the permit.

Q What is your practice as to your issuing permits for the release of goods where the examiner in your office estimates them to be free of duty?

A That estimate may be free of duty. The permit is given to the Chief Inspector, who transmits it to one of the inspectors, who then takes the permit to the place where the goods are deposited and there releases them to the importer and sometimes to the carrier.

Q Is that the general practice of your office?

A That's the general practice of the office, yes sir.

Q That is all.

MR. de STEIGUER: That's all.

BY MR. TODD:

THE GOVERNMENT RESTS.

DEFENDANT'S SURREBUTTAL.

MR. de STEIGUER: I wish now to read in evidence Article 220 of the Customs Regulations, which is as follows:

"Art. 220. *Deposit of Duties—Permit.*—The amount of estimated duties having been registered with the naval officer and deposited with the cashier, a permit on form catalogue No. 584 to land the goods shall be signed by the collector and countersigned by the naval officer, and then be delivered to the importer or his agent, to be sent by him to the inspector in charge of the merchandise.

"Duties are payable in United States gold coins, standard silver dollars, gold and silver certificates of the United States,

in United States notes payable on demand, or in the Treasury notes issued under Act of July 14, 1890."

I read that, if Your Honor please, to show who is the official or the persons responsible for the permits.

Now I wish to introduce in evidence a letter from the Collector of Customs for the District of Puget Sound at Port Townsend, to the Secretary of the Treasury, dated October 26, 1909.

MR. TODD: I think that letter was written by Mr. Blackwood.

MR. de STEIGUER: It is signed by F. C. Harper, the Collector.

MR. TODD: I have no objection to it if I be permitted to recall Mr. Blackwood to explain it, as he is the one who prepared it.

Said letter admitted in evidence and by the Clerk marked DEFENDANT'S EXHIBIT NO. 3, a true copy of which is hereto attached.

MR. de STEIGUER: Defendant rests.

* * * * *

PLAINTIFF'S REJOINDER.

HENRY BLACKWOOD, being recalled on behalf of the Plaintiff, testified as follows on

DIRECT EXAMINATION.

BY MR. TODD:

Calling your attention to Defendant's Exhibit No. 3 to the Secretary of the Treasury, I will ask you who wrote that letter?

A I prepared this letter.

Q What?

A I prepared this letter, yes sir.

Q That is, as Chief Deputy there?

A Yes sir.

Q Calling your attention to the words—

MR. de STEIGUER: Did you sign the letter?

A The letter is signed by the Collector of Customs, Mr. Harper.

MR. de STEIGUER: Then I object to any explanation by this witness of a letter signed by Mr. Harper.

MR. TODD: Just let me ask the question. Calling your attention to this language in the letter: "The question also arises whether there is any limitation on the liquidation of these entries, the goods having entered and been passed free of duty more than one year ago." What does that refer to?

MR. de STEIGUER: We object—that is the letter of the Collector at Port Townsend, and signed by him.

THE COURT: If he has any explanation to make, he may do so.

Defendant excepts—exception allowed.

A That clause, read in connection with the remainder of the letter, means the goods had been delivered to the importer more than a year prior to the date of the letter.

MR. TODD: Had the Collector taken any action relative to passing the goods free of duty at that time?

A No sir.

Q That is all.

MR. de STEIGUER: That's all.

THE PARTIES REST.

* * * * *

BY MR. TODD: If the Court please, I now move that the Court direct a verdict in favor of the plaintiff for the amount claimed in the complaint, with interest thereon at the rate of six per cent. from November 27, 1909.

MR. de STEIGUER: And the defendant at this time moves the Court in the first place to direct a general verdict for the defendant. *Second.* If the Court should not think that motion well taken, we move that the Court instruct a verdict for the defendant as to the first cause of action alleged in the complaint, and, further and separately, that the Court direct a verdict in favor of the defendant as to the second cause of

action set forth in the complaint. The whole matter can be argued together I presume.

THE COURT: The jury may be at ease while I hear the argument on these motions. Retain your seats if you wish, but do not leave the building.

AND BE IT FURTHER REMEMBERED, that thereafter and on the same day, the parties respectively having submitted their proofs and rested their cause and the jury having retired under the order of Court, said cause and the issues raised by said respective motions were argued to the Court at length, at the conclusion of which the Court rendered its oral decision in words and figures as follows, to-wit:

BY THE COURT: In one of the opinions by the Circuit Court of Appeals for the Second Circuit, reference is made to the decision of the Supreme Court in the 130th, the case of *Davis v. Miller*, which refers to the acts of the Collector in making final ascertainment of liquidation, and stamping such liquidation and ascertainment upon the entry, as being the acts which constitute liquidation.

Now looking at this case in the 130th U. S., it refers to a statute of 1864 under which that ruling is made. Can counsel inform me whether there is anything in the Customs Administrative law that is similar to that?

MR. TODD: I cannot, off-hand, Your Honor.

THE COURT: Well, this decision by the Circuit Court of Appeals for the Second Circuit would seem to follow that, as though the old act of 1864 still applies.

MR. TODD: The only thing that I know about the stamping, is the Customs Regulation that provides that the stamp becomes the legal evidence of liquidation. That is the only thing I can call to mind at the present time. I know of no reference to the stamping of the appraisement in the present Administrative Acts.

THE COURT: Well, is that the practice under the regulations?

MR. TODD: Yes, that is the practice under the regulations.

THE COURT: In every entry, do they make a record of the final ascertainment of the amount of duty?

MR. TODD: That is the testimony here.

THE COURT: That is put of record.

MR. TODD: Yes sir, either on record, or by putting the amount below where the change is made.

MR. de STEIGUER: I think the evidence is they generally, when it is passed free of duty, put a line under that column.

MR. TODD: No, the evidence is they put the words under the column of liquidated duties, "as entered."

THE COURT: I think I must yield to the law as declared by the Circuit Court of Appeals for this Circuit. (119 Fed.) In the course of Judge Gilbert's opinion he says:

"The law does not prescribe the time when the Collector shall liquidate the duty. He may liquidate before, or a year after, entry. The only limitation upon his action in that regard is, that after once liquidating, he may not, in the absence of fraud or protest by the owner, importer, agent, or consignee, reliquidate after a year from the date of entry."

That is supported by a citation of the decisions of other courts, and notably the case from the Circuit Court of Appeals for the Second Circuit, and I do not think there is any way of getting away from it. Call the jury.

Whereupon the jury was returned into Court, and the Court delivered his charge to the jury in words and figures as follows, to-wit:

Gentlemen of the Jury, without leaving your seats you may elect one of your number foreman and sign the verdict which I hand you, in order to complete the record in this case. The verdict reads: We, the jury in the above entitled cause, find for the plaintiff and assess its damages at the sum of $12,077.62, in obedience to the peremptory instruction of the Court to so find. (After the signing of the verdict.) The verdict, Gentlemen, has been signed by W. C. Bentley as foreman.

MR. de STEIGUER: If Your Honor please, I presume un-

der the circumstances I can note my exceptions without the retirement of the jury.

THE COURT: Yes sir.

MR. de STEIGUER:

The defendant objects to the granting of the motion of the plaintiff for an instructed verdict for the plaintiff; also to the refusal of the Court to give an instructed verdict generally for the defendant; also to the refusal of the Court to grant an instructed verdict for the defendant as to the first cause of action set forth in the complaint herein, and also except to the refusal of the Court to grant an instructed verdict for the defendant as to the second cause of action alleged in the complaint. I wish an exception to the ruling of the Court in each instance.

THE COURT: The exceptions are allowed.

EXHIBIT "A."

ENTRY FOR CONSUMPTION.

"ALL OVER THE WORLD"
FRANK P. DOW CO.
CUSTOM HOUSE BROKERS
AND FORWARDING AGENTS
Seattle, Wash.
U. S. A.

FRANK P. DOW & CO., INC.
CUSTOM HOUSE BROKERS
300-1 Eilers Bldg.
SEATTLE, WASHINGTON

OF MERCHANDISE IMPORTED BY FRANK P. DOW CO., INC.,

in the Br. S S "OANFA" from Yokohama on Aug. 2 08.
Invoice No. 8292. Dated at London, on April 4 08.

Forwarded from .....**Under I. T. No.**.....**Dated**.....

When This Line Is Not Used Run a Pen Through It

MARKS	NOS.	PACKAGES AND CONTENTS For Specifications see accompanying Invoice	QUANTITY	INVOICE VALUE	DUTIABLE VALUE	RATE OF DUTY	DUTIES
				lbs-s-d			
C. R. Seattle							
	1/1000	900 drums Creosote		2095-10-1	10200 $11331		Free
Con. Inv. No. 9290 London May 8/08 C. R. Seattle							

1001/2000 Con. Inv. No. 1813 Glasgow May 22/08 P C RAM Seattle	1000 drums Creosote	2330-4-8	11340	Free
501/up	281 drums Creosote	752-0-0	3660	Free
	2181	5177-14-9	25200	
		$14594 @ 45%		$6567.30
		INCREASED DUTY		6567.30

LIQUIDATED Nov. 27, 1909.

FRANK P. DOW CO., INC. N. W. O.

By Frank P. Dow, Pres.

IMPORTER

Estimated Duty Paid, $.....

Bond, Cat. No. 583, 589½, 596, Taken.

ORIGINAL
DUPLICATE
TRIPLICATE

Entered at Port of Tacoma, Wash. Aug. 3/08.

Ex. "A" Plf. 1826

DECLARATION OF OWNER.

In Cases Where Merchandise Has been Actually Purchased.

I, Frank P. Dow, of the firm of Frank P. Dow Co., Inc., do solemnly and truly declare that we are agents of the merchandise described in the annexed entry and invoice; that the invoice and bill of lading now presented by me to the Dep. Collector of Customs are the true and only invoice and bill of lading by me received of all the goods, wares and merchandise imported in the Br. S/S "OANFA" whereof .....is master, from Yokohama, for account of any person whomsoever for whom I am authorized to enter the same; that the said invoice and bill of lading are in the state in which they were actually received by me, and that I do not know or believe in the existence of any other invoice or bill of lading of said goods, wares and merchandise; that the entry now delivered to the collector contains a just and true account of the said goods, wares and merchandise, according to the said invoice and bill of lading; that nothing has been, on my part, nor to my knowledge on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise; that the said invoice and the declaration therein are in all respects true, and were made by the person by whom the same purports to have been made; that if at any time hereafter I discover any error in the said invoice, or in the account now rendered of the said goods, wares and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district. And I do further solemnly and truly declare that to the best of my knowledge and belief Pacific Creosoting Co., Seattle, Wash., are the owners of the goods, wares and merchandise mentioned in the annexed entry; that the invoice now produced by me exhibits the true value at the time of exportation to the United States in the principal markets of the country from whence imported of the said goods, wares and merchandise, and includes and specifies the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, and all other costs, charges and expenses incident to placing said goods, wares, and merchandise in condition packed ready for shipment to the United States, and no other or different discount, bounty, or drawback but such as has been actually allowed on the same.

FRANK P. DOW.

PORT OF TACOMA, WASH., Aug. 3rd, 1908.

Personally appeared before me, at the place and time above written, the said Frank P. Dow, known to me to be the identical person named, and subscribed and made declaration to the foregoing.

M. S. HILL,
Deputy Collector of Customs.

OATH FOR RETURN OF AMERICAN PRODUCTS EXPORTED.

I, ...the firm of.....
o solemnly, sincerely and truly swear that the several articles of Merchandise mentioned in the entry hereto annexed are
o the best of my knowledge and belief, truly and bona fide of the growth, product or manufacture of the United States;
nat they were truly exported and imported as therein expressed; that they are returned without having been advanced in
alue or improved in condition by any process of manufacture or other means; and that no drawback, bounty or allow-
nce has been paid or admitted thereon, or any part thereof.

.....
Importer.

PORT OF SEATTLE.....

Personally appeared before me, at the place and time above written, the said .....
nown to me to be the identical person named, and subscribed and made declaration to the foregoing.

WITNESS my hand and seal the date above written:

.....
Deputy Collector. Customs Notary.

DUPLICATE 63154

CONSUMPTION ENTRY

I. T. No......*Port*.....

District No. 906

Sub-Port No. 81-A

G. O. No......B

Port of Tacoma, Wash.

Entry Dated Aug. 3/08.

Frank P. Dow & Co., Inc.,
Importer

Per Br. S/S "OANFA"
From Yokohama
Date of Importation Aug. 2/08
Estimated Duty ..... $ Free

FRANK P. DOW CO., INC.
CUSTOM HOUSE BROKERS
300-1 Eilers Building
SEATTLE, WASHINGTON

(Stamped)

CUSTOM HOUSE,
TACOMA, WASH.,
Aug. 3, 1908.

DIST. PUGET SOUND.

"All Over the World"
FRANK P. DOW CO.
CUSTOM HOUSE BROKERS
AND FORWARDING AGENTS
Seattle, Wash.
U. S. A.

District of
PUGET SOUND

Indorsed: (Stamped) Case No. 1826. Plaintiff's Exhibit "A," United States Circuit Court, U. S. vs. Pac. Creosoting Co. Filed June 28, 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

EXHIBIT "B."

"ALL OVER THE WORLD"
FRANK P. DOW CO.
CUSTOM HOUSE BROKERS
AND FORWARDING AGENTS
Seattle, Wash.
U. S. A.

FRANK P. DOW & CO., INC.
CUSTOM HOUSE BROKERS
300-1 Eilers Bldg.
SEATTLE, WASHINGTON

ENTRY FOR CONSUMPTION.

OF MERCHANDISE IMPORTED BY PACIFIC CREOSOTING CO.

in the Br. S S "BELLEROPHON" from Yokohama on Aug. 29, 1908.
Invoice No. 11046. Dated at London, Eng., on June 3 08.

Forwarded from .....Under I. T. No.....Dated.....

When This Line Is Not Used Run a Pen Through It

MARKS	NOS.	PACKAGES AND CONTENTS For Specifications see accompanying Invoice	QUANTITY	INVOICE VALUE	DUTIABLE VALUE	RATE OF DUTY	DUTIES
				lbs-s-d-			
T. E. Seattle							
		Drums	Gals.				
	1/1000	1000 Creosote	91000	2330-4-8-	$11340	Free	
Con. Inv. No. 2154 Glasgow June 23/08 P C RAM							

No. 1/500	482 Barrels Creosote		43862	900-0-0	4380	Free
	1482			3230-4-8	$15720	
		No. 9917 @ 45%				$4462.65
		INCREASED DUTY				4462.65

LIQUIDATED NOV. 27, 1909.

N. W. O.

PACIFIC CREOSOTING CO.

By H. R. Rood, Vice Pres.,

IMPORTER

Estimated Duty Paid, $.....

Bond, Cat. No. 583, 589½, 596, Taken.

ORIGINAL
DUPLICATE
TRIPLICATE

Entered at Port of Tacoma, Wash. Aug. 29, 1908.

No. 1826

DECLARATION OF OWNER.

x. "B" Pltf.

In Cases Where Merchandise Has Been Actually Purchased.

I, H. R. Rood, Vice. Pres. of the firm of Pacific Creosoting Co., do solemnly and truly declare that I am the owner f the merchandise described in the annexed entry and invoice; that the entry now delivered by me to the Collector of ustoms contains a just and true account of all goods, wares, and merchandise imported by or consigned to us in the Br. /S "BELLEROPHON," from Yokohama;

That the invoice and entry which I now produce contains a just and faithful account of the actual cost of said goods, ares, and merchandise and includes and specifies the value of all cartons, cases, crates, boxes, sacks, and coverings of ny kind, and all other costs, charges, and expenses incident to placing said goods, wares, and merchandise in condition, acked ready for shipment to the United States, and no other discount, drawback or bounty, but such as has been actually llowed on the same; that I do not know or believe in the existence of any invoice or bill of lading other than those now roduced by me, and that they are in the state in which I actually received them.

And I further solemnly and truly declare that I have not in the said entry or invoice concealed or suppressed anyhing whereby the United States may be defrauded of any parts of the duty lawfully due on the said goods, wares, and nerchandise; that to the best of my knowledge and belief the said invoice and the declarations thereon are in all respects rue, and were made by the person by whom the same purports to have been made; and that if at any time hereafter I iscover any error in the said invoice or in the account now produced of said goods, wares, and merchandise, or receive ny other invoice of the same, I will immediately make the same known to the Collector of Customs of this district.

H. R. ROOD,
Importer.

PORT OF SEATTLE, Aug. 29, 1908.

Personally appeared before me, at the place and time above written, the said H. R. Rood, known to me to be the dentical person named, and subscribed and made declaration to the foregoing.

Witness my hand and official seal the date above written.

FRANK P. DOW,
Customs Notary.
(Seal)

OATH FOR RETURN OF AMERICAN PRODUCTS EXPORTED.

I, ...the firm of.....
o solemnly, sincerely and truly swear that the several articles of Merchandise mentioned in the entry hereto annexed are
the best of my knowledge and belief, truly and bona fide of the growth, product or manufacture of the United States;
at they were truly exported and imported as therein expressed; that they are returned without having been advanced in
alue or improved in condition by any process of manufacture or other means; and that no drawback, bounty or allow-
nce has been paid or admitted thereon, or any part thereof.

.....
Importer.

PORT OF SEATTLE.....

Personally appeared before me, at the place and time above written, the said .....
nown to me to be the identical person named, and subscribed and made declaration to the foregoing.

WITNESS my hand and seal the date above written:

.....
Deputy Collector. Customs Notary.

DUPLICATE, 63154

CONSUMPTION ENTRY

I. T. No......*Port*.....

District No. 1722

Sub-Port No. 147-A

G. O. No......B

Port of Tacoma, Wash.

Entry Dated Aug. 29, 1908.

Pacific Creosoting Co.
Importer

Per Br. S/S "BELLEROPHON"
From Yokohama
Date of Importation Aug. 29, 1908
Estimated Duty ..... *$* Free

FRANK P. DOW CO., INC.,
CUSTOM HOUSE BROKERS
300-1 Eilers Building
SEATTLE, WASHINGTON

(Stamped)

CUSTOM HOUSE,
TACOMA, WASH.,
Aug. 29, 1908.

DIST. PUGET SOUND.

"All Over the World"
FRANK P. DOW CO.
CUSTOM HOUSE BROKERS
AND FORWARDING AGENTS
Seattle, Wash.
U. S. A.

District of
PUGET SOUND

Indorsed: (Stamped) Case No. 1826. Plaintiff's Exhibit "B," United States Circuit Court, Western District of Washington, U. S. vs. Pac. Creosoting Co. Filed Jun 28, 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

PLAINTIFF'S EXHIBIT "C" (Pink Slips).

Cat. No. 157.

NO. OF ENTRY 906.

Port or
District

PUGET SOUND.

Date of Entry, Aug. 3, 1908.
Importer, Frank P. Dow Co.
No. of Abstract on which reported: 20.
Estimated Duty, $ Free
Liquidated Duty, $.....
..... $.....
(Increase or excess)
No. of packages, 2181.

* * * * * * * * * * * * *

Not forwarded for the following reason:

WAITING COMPLETION.

F. C. HARPER,
Collector of Customs.

* * * * * * * * * * * * *

To be carefully observed:

Under Department Circular No. 29, March 10, 1906, all entries for the month are required to be forwarded by the same mail on or before the tenth day of the succeeding month.

If, for any reason, any entry or entries cannot be forwarded at the time, one of these slips must be filled up in detail for each entry retained, and be placed with the entry forwarded in the numerical position of the entry withheld.

The old form Cat. No. 157, has been discontinued.

* * * * * * * * * * * * *

No. of Entry, 906.

Date, Aug. 3, 1908, Abstract 20.

DISTRICT: PUGET SOUND.

To be carefully filled out by the Collector to this line, but not below.

LIQUIDATING CLERK .....

(To be filled out in the Department.)

Received.....190

.....

Clerk.

Indorsed: Filed U. S. Circuit Court, Western District of Washington, June 28, 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

Case No. 1826. United States Circuit Court, Western District of Washington, U. S. vs. Pac. Creosoting Co. Plaintiff's Exhibit No. "C."

Cat. No. 157.

NO. OF ENTRY, 1722.

Port of
District

PUGET SOUND.

Date of Entry, Aug. 29, 1908.
Importer, Pacific Creosoting Co.
No. of Abstract on which reported, 20.
Estimated Duty, $ Free
Liquidated Duty, $.....
..... $.....
(Increase or excess)
No. of packages, 1482.

* * * * * * * * * * * * *

Not forwarded for the following reason:

WAITING COMPLETION.

F. C. HARPER,
Collector of Customs.

* * * * * * * * * * * * *

To be carefully observed:

Under Department Circular No. 29, March 10, 1906, all entries for the month are required to be forwarded by the same mail on or before the tenth day of the succeeding month.

If, for any reason, any entry or entries cannot be forwarded at the time, one of these slips must be filled up in detail for each entry retained, and be placed with the entry forwarded in the numerical position of the entry withheld.

The old form Cat. No. 157, has been discontinued.

* * * * * * * * * * * * *

No. of Entry, 1722.

Date, Aug. 29, 1908. Abstract 20.

DISTRICT: PUGET SOUND.

To be carefully filled out by the collector to this line, but not below.

LIQUIDATING CLERK, ...

(To be filled out in the Department.)

Received.....190

.....

Clerk.

Indorsed: Filed U. S. Circuit Court, Western District of Washington, June 28, 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

Case No. 1826. United States Circuit Court, Western District of Washington. U. S. vs. Pac. Creosoting Co. Plaintiff's Exhibit No. "C."

EXHIBIT "D."

Cat. No. 654-b
Art. 1416-C. C. 1899
Ed. May 27-'08-7,000

NOTICE OF ENTRIES LIQUIDATED NOV. 27, 1909.

NAME OF VESSEL	WHENCE ARRIVED	DATE OF ARRIVAL	IMPORTER	DATE OF ENTRY	SUB-PORT NO.	DIST. NO.	ESTIMATED DUTY	LIQUIDATED DUTY	INCREASED AND ADDITIONAL DUTY	EXCESS
			Frank P. Dow							
			Co., Inc.	Aug. 3/08	81-A	906		6567.30	6567.30	
			Pacific Creo-							
			soting Co.	Aug. 29/08	147	1722		4462.65	4462.65	
	(Amended)									
			Y. Okamara	Oct. 8/09	316	3446	19.65	"As Entered"		

(Customs House Stamp)
CUSTOM HOUSE
TACOMA, WASH.
Nov. 29, 1909.
DIST. PUGET SOUND.

Indorsed: Case No. 1826. United States Circuit Court, Western District of Washington, vs. Plaintiff's Exhibit No. "D." Filed U. S. Circuit Court, Western District of Washington, June 28, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

D. H. H.

EXHIBIT "E."

"ALL OVER THE WORLD"
FRANK P. DOW CO.
CUSTOM HOUSE BROKERS
AND FORWARDING AGENTS
Seattle, Wash.
U. S. A.

FRANK P. DOW CO., INC.,
CUSTOM HOUSE BROKERS
260 Colman Building
Seattle, Washington

Seattle, Washington, Dec. 9th, 1909.

Collector of Customs,
District of Puget Sound,
Port Townsend, Wash.

Sir:—

Protest is hereby made against your decision assessing duty at 45% or other rates on iron drums containing creosote oil contained in the entry described below. The grounds for objection, under the Tariff Act of July 24th, 1897, are that said merchandise is properly free as usual and necessary coverings. Reference is made to unpublished decision 50697/488-B, April 1st, /02, covering iron drums containing sulphuric acid, and to T. D. 23131-G. A. 4947 covering iron drums containing crude glycerine, and to T. D. 21961-G. A. 4649 showing conditions that must exist to render coverings dutiable, and to T. D. 23853-G. A. 5172 stating that coverings free goods are themselves free of duty, and to T. D. 24190-G. A. 5268 referring to boxes for Sumatra tobacco.

The offer is hereby made to furnish evidence of the facts involved and in support of the contention herein, to the Board of United States General Appraisers, on receipt of reasonable notice from them.

The amount exacted is paid under duress and compulsion, in order to obtain and retain possession of the said merchandise, and it is claimed the entry should be re-adjusted and the overcharge refunded.

FRANK P. DOW CO., INC.
By R. A. WHITE, Agent.

Entry Number 81/A.
Imported in the Br. Str. OANFA.
From Yokohama.
Date of Arrival, Aug. 2, 1908.
Liquidated Nov. 27, 1909.

Please address all communications to Frank P. Dow Co., Inc., Seattle, Wash.

(Stamped by Clerk Circuit Court). Case No. 1826. United States Circuit Court, Western District of Washington, vs. Plaintiff's Exhibit No. "E."

1826 Pltfs. Exhibit "E"

PROTEST

District of Puget Sound.

Importer, Frank P. Dow Co.
Vessel, Br. S/S OANFA.
Date, Aug. 2, 1908.
Filed, Dec. 10, 1909.

F. E. King,
Dep. Col'r.

CUSTOM HOUSE
Tacoma, Wash.
Dec. 10, 1909.

DIST. PUGET SOUND.

"All Over the World"
FRANK P. DOW CO.
CUSTOM HOUSE BROKERS
AND FORWARDING AGENTS
Seattle, Wash.
U. S. A.

FRANK P. DOW CO., INC.
CUSTOM HOUSE BROKERS
260 Colman Building
Seattle, Washington.

Indorsed: Filed U. S. Circuit Court, Western District of Washington, June 28, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

EXHIBIT "F."

"ALL OVER THE WORLD"
FRANK P. DOW CO.
CUSTOM HOUSE BROKERS
AND FORWARDING AGENTS
Seattle, Wash.
U. S. A.

FRANK P. DOW CO., INC.
CUSTOM HOUSE BROKERS
260 Colman Building
Seattle, Washington

Seattle, Washington, Dec. 9th, 1909.

Collector of Customs:
District of Puget Sound,
Port Townsend, Wash.

Sir:—

Protest is hereby made against your decision assessing duty at or other rates on iron drums containing creosote oil contained in the entry described below. The grounds for objection, under the Tariff Act of July 24th, 1897, are that said merchandise is properly free as usual and necessary coverings. Reference is made to unpublished decision 50697/488-B, April 1st, /02, covering iron drums containing sulphuric acid, and to T. D. 23131-G. A. 4947 covering iron drums containing crude glycerine, and to T. D. 21961-G. A. 4649 showing conditions that must exist to render coverings dutiable, and to T. D. 23853-G. A. 5172 stating that coverings free goods are themselves free of duty, and to T. D. 24190-G. A. 5268 referring to boxes for Sumatra tobacco.

The offer is hereby made to furnish evidence of the facts involved and in support of the contention herein, to the Board of United States General Appraisers, on receipt of reasonable notice from them.

The amount exacted is paid under duress and compulsion, in order to obtain and retain possession of the said merchandise, and it is claimed the entry should be re-adjusted and the overcharge refunded.

PACIFIC CREOSOTING COMPANY.
By R. A. WHITE, Agent.

Entry Number 147-A.
Imported in the Br. Str. BELLEROPHON.
From Yokohama.
Date of Arrival Aug. 29, 1908.
Liquidated Nov. 27, 1909.

Please address all communications to Frank P. Dow Co., Inc., Seattle, Wash.

(Stamped by Clerk Circuit Court). United States Circuit Court, Western District of Washington, vs. Plaintiff's Exhibit No. "F."

1826 Pltfs. Exhibit "F"

PROTEST

District of Puget Sound.

Importer, Pacific Creosoting Co.
Vessel, Br. S/S BELLEROPHON.
Date, Aug. 29, 1908.
Filed, Dec. 10, 1909.

F. E. King,
Deputy Collector.

CUSTOM HOUSE
Tacoma, Wash.
Dec. 10, 1909.

DIST. PUGET SOUND.

"All Over the World"
FRANK P. DOW CO.
CUSTOM HOUSE BROKERS
AND FORWARDING AGENTS
Seattle, Wash.
U. S. A.

FRANK P. DOW CO., INC.
CUSTOM HOUSE BROKERS
260 Colman Building
Seattle, Washington.

Indorsed: Filed U. S. Circuit Court, Western District of Washington, June 28, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

DEFENDANT'S EXHIBIT No. 1.

Cat. No. 618.
Art. 410, C. R. 1899. C. E. 81-A.

PERMIT TO DELIVER FREE GOODS.

CUSTOMS HOUSE, Port of Tacoma,
Aug. 3rd, 1908.

TO THE STOREKEEPER:

WE CERTIFY that Frank P. Dow Co., Inc., has made due entry according to law of the following merchandise imported in the Br. S/S OANFA, ... Master, from Yokohama, on Aug. 3/08; which being exempt from duty by law permission is hereby given to deliver the same, viz:

Marks	Numbers	Description of Merchandise	Send to Appraisers Store
C. R. Seattle	1/1000	900 Drums Creosote	
C. R. Seattle	1001/2000	1000 " "	
P C RAM	501/up	281	
		2181	
Seattle	Total	2181	

CUSTOMS HOUSE, TACOMA, WASH.,
Aug. 3, '08.

This is to certify that I have this day examined the goods specified in the within permit and finding them to be exactly as described, have delivered them to N. P. Railway Co.

JAMES DORSEY,
Inspector.

EXAMINED.

W. F. COLLIER,
Examiner.

755 Drums Creosote Discharged at Tacoma on S/S Oanfa.
1426 Discharged at Seattle.
See letter Aug. 15/08.

WFC., In.
M. S. HILL,
Deputy Collector.

FRANK P. DOW CO., Inc.,
Custom House Brokers
SEATTLE, WASH.

NO
Deputy Naval Officer.

Endorsements to Defendant's Exhibit No. 1 as follows:

1826. Filed United States Circuit Court, Western District of Washington, Jun 28, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

Case No. 1826. United States Circuit Court, Western District of Washington, vs. Defendant's Exhibit No. 1.

DEFENDAN'S EXHIBIT NO. 2.

Cat. No. 584b
Art. 412, C. R. 1899.
Entry No. 147-a.

PERMIT TO LAND AND DELIVER DUTIABLE GOODS.

CUSTOM HOUSE, PORT OF TACOMA, WASH.,
Aug. 29th, 1908.

TO THE INSPECTOR IN CHARGE:

WE CERTIFY that Pacific Creosoting Co. has made due entry according to law and regulations, and has paid or secured to be paid, the duties on merchandise contained in the following packages; which merchandise was imported in the Br. S/S BELLEROPHON, ... Master, from Yokohama on August 29th, 1908; permission is hereby given to land

and deliver the same except the packages ordered to Appraiser's Store for examination, viz:

Marks	Numbers	Description of Merchandise	Send to Appraisers Store
T. E. Seattle P C RAM	1/1000 No. 1/500	900 Drums Creosote 482 Barrels "	
		1482	
		1382 Short shipped 100 Drums.	

EXAMINED.

W. F. COLLIER,
Examiner.

CUSTOMS HOUSE, Tacoma, Wash., Aug. 30, 1908.

This is to certify that I have this day examined the goods specified in the within permit and finding them to be exactly as described, have delivered them to W. B. Brituree.

M. S. HILL,
Deputy Collector.

FRANK P. DOW CO., Inc.,
Custom House Brokers,
SEATTLE, WASH.

NO
Deputy Naval Officer.

Endorsed: 1826. Filed, U. S. Circuit Court, Western District of Washington, June 28, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

Case No. 1826. UNITED STATES CIRCUIT COURT, Western District of Washington, vs. Defendant's Exhibit No. 2.

DEFENDANT'S EXHIBIT NO. 3.

"OFFICE OF THE COLLECTOR OF CUSTOMS,
PORT OF PORT TOWNSEND, WASH.
Port Townsend, Wash.,
October 26, 1909."

(Stamped) Case No. 1826. United States Circuit Court, Western District of Washington, vs. Defendant's Exhibit No. 3.
"The Honorable,
The Secretary of the Treasury,
Division of Customs,
Washington, D. C.

Sir:

Inviting the attention of the Department to T. D. 29980, wherein the Board of U. S. General Appraisers decides that iron drums are unusual coverings for creosote oil, I have the honor to request you to advise this office whether the enclosed entries C. E. 81 and 147-a, of August, 1908, covering similar merchandise imported at Tacoma, Wash., should be classified and liquidated in accordance with the above decision. These goods are earlier importations and the liquidation of the entries was suspended awaiting the action of the Board of U. S. General Appraisers and advice from the Department whether the board's decision should be treated as retroactive to this extent. If duty is assessed on the drums in question covered by the enclosed entries, it would amount to about $11,500. The question also arises whether there is any limitation upon the liquidation of these entries, the goods having been entered and passed free of duty more than one year ago (Art. 1065, C. R. 1908), although this office is inclined to the opinion that the limitation does not begin to run until after the liquidation of the entry.

Respectfully,
F. C. HARPER,
Collector."

Endorsed: 1826. Defts. Exhibit 3. Filed United States Circuit Court, Western District of Washington, June 28, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

(Art. 1037 Customs Regulations, read in evidence by Plff.)

ART. 1037. *Record of Liquidations.*—A daily record shall be kept by the collector of all entries liquidated, stating the name of the vessel, port of departure, date of arrival, name of importer, and serial number and date of entry. A daily record must also be kept by both the collector and the naval officer of all duties, additional and regular, due upon liquidation, and notice of such liquidation be promptly sent to the parties in interest. If within ten days thereafter such duties shall not have been paid, the collector may, in his discretion, cause an investigation to be made to ascertain the whereabouts of such parties, and if they cannot be found, or are dead leaving no estate, or are insolvent, he shall report the facts to the solicitor of the Treasury, who may authorize the collector to treat such case as uncollectable, without prejudice, however, to the right of action on the part of the Government. It shall be the duty of the collector to keep a record of all such cases and from time to time make such efforts as may be possible to collect such duties. In all other cases after said ten days the district attorney shall be instructed to proceed for the recovery of such duties. (See Arts. 1347 *et seq.*)

United States of America,
Western District of Washington,
Northern Division.—ss.

CERTIFICATE TO BILL OF EXCEPTIONS.

For the purpose of making the foregoing matters a part of the record herein, I, CORNELIUS H. HANFORD, Judge of the United States District Court for the Western District of

Washington, before whom said cause was tried with a jury as aforesaid, having duly settled and hereby settling and allowing the foregoing Bill of Exceptions in said above entitled action, do certify the same, and

DO HEREBY CERTIFY that this Bill of Exceptions, together with the exhibits marked Plaintiff's "A," "B," "C," "D," "E" and "F," and Defendant's numbers "1," "2" and "3," therein set forth or referred to, contains all the evidence, exhibits and other material facts, matters and proceedings in said cause not already a part of the record therein.

IN WITNESS WHEREOF the undersigned has hereunto set his hand, with his title of office, at SEATTLE, in the Northern Division of the Western District of Washington, this 22nd day of July, A. D. 1911.

C. H. HANFORD,
District Judge of the United States for the Western District of Washington.

Indorsed: Defendant's Bill of Exceptions. Settled and filed U. S. Circuit Court, Western District of Washington, July 22, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PACIFIC CREOSOTING COMPANY,
a corporation,
Defendant.
No. 1826.

PETITION FOR WRIT OF ERROR.

The Pacific Creosoting Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury on June 28, 1911, and the judgment entered in the above entitled cause on the 29th day of June, 1911, comes now by George E. de Steiguer, its attorney, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

G. E. de STEIGUER,
Attorney for Defendant.

Indorsed: Petition for Writ of Error. Filed U. S. Circuit Court, Western District of Washington, Aug. 21, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PACIFIC CREOSOTING COMPANY,
a corporation,
Defendant.
No. 1826.

ORDER ALLOWING WRIT OF ERROR.

Upon motion of George E. de Steiguer, attorney for defendant, and upon filing the petition for a writ of error, and an assignment of errors,

It is ORDERED that a writ of error be and is hereby allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and that the amount of bond on said Writ of Error, such bond to act as a supersedeas thereon, be and is hereby fixed at Fifteen Thousand Dollars.

Done this 21st day of August, 1911.

C. H. HANFORD, Judge.

Indorsed: Order Allowing Writ of Error. Filed U. S. Circuit Court, Western District of Washington, Aug. 21, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PACIFIC CREOSOTING COMPANY,
a corporation,
Defendant.
No. 1826.

ASSIGNMENT OF ERRORS.

Comes now the above named defendant, Pacific Creosoting Company, by its attorney, G. E. de Steiguer, and in connection with its Petition for a Writ of Error herein, makes the following Assignment of Errors, which it will urge upon the prosecution of its said Writ of Error in the above entitled cause, and which it avers occurred upon the trial of said cause, to-wit:

1. The Court erred in giving a peremptory instruction to the jury to render a verdict for the plaintiff, which instruction was as follows:

"Gentlemen of the jury, without leaving your seats you may elect one of your number foreman and sign the verdict which I hand you, in order to complete the record in this case. The verdict reads: We the jury in the above entitled cause find for the plaintiff and assess its damages at the sum of $12077.62, in obedience to the peremptory instruction of the court to so find."

2. The court erred in refusing to grant a peremptory instruction in favor of the defendant as to both causes of action, or either cause of action, which instructions were requested by the defendant as follows:

"The defendant at this time moves the court in the first place to direct a general verdict for the defendant. *Second.* If the court should not think that motion well taken, we move that the court instruct a verdict for the defendant as to the first cause of action alleged in the complaint, and, further and separately, that the court direct a verdict in favor of the defendant as to the second cause of action set forth in the complaint."

3. The court erred in admitting, over defendant's objection, plaintiff's Exhibit "E," being a protest filed by the defendant against one of the purported liquidations referred to in the complaint.

4. The court in admitting, over defendant's objection, plaintiff's Exhibit "F," being a protest made by the defendant against one of the purported liquidations referred to in the complaint.

5. The court erred in admitting, over defendant's objection, the testimony of the witness, Henry Blackwood, as follows:

"Action of the office as to classification of these invoices was suspended,"

For the reason that said statement was a mere legal conclusion, and that, if true, it is only provable by some record of the Collector's office.

6. The court erred in admitting, over Defendant's objection, the testimony of the witness, Henry Blackwood, that the collector "concluded to classify the next importation of steel drums containing creosote as an unusual covering, the steel drum taking the rate of duty of forty-five per cent., and continued to suspend action as to classification of these two importations pending the result of the decision of the General Board of Appraisers,"

For the reason that said statement is a mere conclusion of law, and if true is only provable by the record of the Collector's office.

7. The court erred in admitting, over defendant's objection, the testimony of the witness, Henry Blackwood, of his

explanation of a letter of the Collector for the Port of Puget Sound, which said testimony was as follows:

"MR. TODD: Just let me ask the question. Calling your attention to this language in the letter: 'The question also arises whether there is any limitation on the liquidation of these entries, the goods having entered and been passed free of duty more than one year ago.' What does that refer to?

MR. de STEIGUER: We object—that is the letter of the Collector at Port Townsend, and signed by him.

THE COURT: If he has any explanation to make, he may do so.

Defendant excepts—exception allowed.

A That clause, read in connection with the remainder of the letter, means the goods had been delivered to the importer more than a year prior to the date of the letter."

8. The court erred in denying the defendant's motion for a new trial.

WHEREFORE said Pacific Creosoting Company prays that said judgment of the Circuit Court of the United States for the Western District of Washington, Northern Division, be reversed, and that said court be instructed to enter judgment in favor of said defendant; or failing that, that said court be instructed to grant a new trial in said cause.

G. E. de STEIGUER,
Attorney for the Defendant, Pacific Creosoting Company.

Indorsed: Assignment of errors. Filed U. S. Circuit Court Western District of Washington, August 21, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PACIFIC CREOSOTING COMPANY,
a corporation,
Defendant.
No. 1826.

BOND ON WRIT OF ERROR.

Know All Men by These Presents:

That the Pacific Creosoting Company, defendant above named, as principal, and National Surety Company, a corporation, organized under the laws of the State of New York, as surety, are held and firmly bound unto the United States of America, plaintiff above named, in the full and just sum of Fifteen Thousand Dollars, to be paid to the said plaintiff, to which payment, well and truly to be made, the said principal binds itself and its successors, and the said surety binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 24th day of August, 1911.

The condition of the above obligation is such that:

Whereas, lately, at a session of the Circuit Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said court, between the said United States of America as plaintiff, and the Pacific Creosoting Company as defendant, a final judgment was rendered against said defendant in the sum of Twelve Thousand Seventy-seven and 62/100 ($12,077.62) Dollars, with costs; and

WHEREAS the said defendant has obtained from the said Circuit Court a writ of error to reverse the judgment in the aforesaid suit, and a citation, directed to the said plaintiff, has been issued, citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, California;

NOW, THEREFORE, if the said Pacific Creosoting Company shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation is to be void; otherwise to remain in full force and effect.

(Seal) PACIFIC CREOSOTING COMPANY,
By H. R. Rood, V. P.

(Seal) NATIONAL SURETY COMPANY,
By John W. Roberts, Its Resident Vice-President.

Attest:
GEO. W. ALLEN,
Its Resident Assistant Secretary.

The sufficiency of the surety to the foregoing bond approved by me this 24th day of August, 1911.

C. H. HANFORD, Judge.

Indorsed: Bond on Writ of Error. Filed U. S. Circuit Court Western District of Washington, Aug. 24, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC CREOSOTING COMPANY,
a corporation,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

No.....

WRIT OF ERROR (Original)

United States of America.—ss.

The President of the United States of America, to the Honorable Judge of the Circuit Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, between the United States of America, plaintiff, and Pacific Creosoting Company, defendant, a manifest error has happened to the great damage of the said defendant, Pacific Creosoting Company, and it being fit, and we being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit; together with this Writ, so that you have the same at the City of San Francisco, in the State of California, on the 15th day of September, 1911, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said

United States Circuit Court of Appeals may cause further to be done herein, to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 21st day of August, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States one hundred and thirty-six.

SAM'L D. BRIDGES,
Clerk of the Circuit Court of the United States for the Western District of Washington.
(Seal) By B. O. WRIGHT, Deputy Clerk.

The foregoing writ is allowed by me this 21st day of August, 1911.

C. H. HANFORD,
District Judge Presiding in the United States Circuit Court for the Western District of Washington, Northern Division.

I hereby accept due personal service of the foregoing Writ of Error on behalf of the United States of America, defendant in error, this 24th day of August, 1911, and acknowledge receipt of a copy of said writ of error, copy of bond on writ of error, copy of assignment of errors, copy of petition for writ of error, and copy of order allowing writ of error.

ELMER E. TODD.

Indorsed: No. ..... In the U. S. Circuit Court of Appeals for the Ninth Circuit. Pacific Creosoting Co., Pltf. in Error, v. U. S. of America, Deft. in Error. Writ of Error. Filed U. S. Circuit Court Western District of Washington, Aug. 24, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

Service of papers in this case may be made upon George E. de Steiguer, Attorney for Pltf. in Error, at No. 618 New York Block, Seattle, Wash.

In the United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC CREOSOTING COMPANY,
a corporation,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.
No. .....

WRIT OF ERROR. (Lodged Copy.)

United States of America.—ss.

The President of the United States of America, to the Honorable Judge of the Circuit Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, between the United States of America, plaintiff, and Pacific Creosoting Company, defendant, a manifest error has happened to the great damage of the said defendant, Pacific Creosoting Company, and it being fit, and we being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the City of San Francisco, in the State of California, on the 15th day of September, 1911, in said Circuit Court of Appeals, to be then and there held, that the record and proceed-

ings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done herein, to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 21st day of August, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States one hundred and thirty-six.

SAM'L D. BRIDGES,
Clerk of the Circuit Court of the United States for the Western District of Washington.
(Seal) By B. O. WRIGHT, Deputy Clerk.

The foregoing writ is allowed by me this 21st day of August, 1911.

C. H. HANFORD,
District Judge Presiding in the United States Circuit Court for the Western District of Washington, Northern Division.

I hereby accept due personal service of the foregoing Writ of Error on behalf of the United States of America, defendant in error, this 24th day of August, 1911, and acknowledge receipt of a copy of said writ of error, copy of bond on writ of error, copy of assignment of errors, copy of petition for writ of error and copy of order allowing writ of error.

ELMER E. TODD.

Indorsed: No. ..... In the U. S. Circuit Court of Appeals for the Ninth Circuit, Pacific Creosoting, Co. Pltf. in Error, v. U. S. of America, Deft. in Error. Lodged Copy Writ of Error. Filed U. S. Circuit Court Western District of Washington, Aug. 24, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy. Service of papers in this case may be made upon George E. de Steiguer, Attorney for Defendant, at No. 618 New York Block, Seattle, Wash.

In the United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC CREOSOTING COMPANY,
a corporation,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

No. .....
CITATION.
(ORIGINAL.)

UNITED STATES OF AMERICA.—ss.

The President of the United States to the United States of America, and to Elmer E. Todd, United States Attorney:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 15th day of September, 1911, pursuant to a Writ of Error filed in the Clerk's office for the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein the Pacific Creosoting Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 21st day of August, 1911.

C. H. HANFORD,
District Judge, Presiding in the United States Circuit Court, for the Western District of Washington.

(Seal)

I hereby accept due personal service of the foregoing citation on behalf of the United States of America, Defendant in Error, this 24th day of August, 1911.

ELMER E. TODD,
United States Attorney.

Indorsed: No. ..... In the U. S. Circuit Court of Appeals for the Ninth Circuit; Pacific Creosoting Co. Pltf. in Error, v. U. S. of America, Deft. in Error. Citation. Filed U. S. Circuit Court, Western District of Washington, Aug. 24, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

Service of papers in this case may be made upon George E. de Steiguer, Attorney for Pltf. in Error, at No. 618 New York Block, Seattle, Wash.

In the United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC CREOSOTING COMPANY, a corporation,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

No. .....
CITATION.
(Lodged Copy.)

UNITED STATES OF AMERICA.—ss.

The President of the United States to the United States of America, and to Elmer E. Todd, United States Attorney:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of

California, on the 15th day of September, 1911, pursuant to a Writ of Error filed in the Clerk's office for the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein the Pacific Creosoting Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 21st day of August, 1911.

C. H. HANFORD,
District Judge, Presiding in the United States Circuit Court, for the Western District of Washington.

(Seal)

I hereby accept due personal service of the foregoing Citation on behalf of the United States of America, Defendant in Error, this 24th day of August, 1911.

ELMER E. TODD,
United States Attorney.

Indorsed: No. ..... In the U. S. Circuit Court of Appeals for the Ninth Circuit. Pacific Creosoting Co. v. U. S. America, Lodged Copy Citation. Filed U. S. Circuit Court, Western District of Washington, Aug. 24, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

Service of papers in this case may be made upon George E. de Steiguer, Attorney for Pltf. in Error, at No. 618 New York Block, Seattle, Wash.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
PACIFIC CREOSOTING COMPANY,
a corporation,
Defendant.
No. 1826.

PRAECIPE FOR TRANSCRIPT OF RECORD.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare and certify a Transcript for the United States Circuit Court of Appeals for the Ninth Circuit, consisting of the following files, records and papers in the above entitled cause:

1. Complaint.
2. Answer.
3. Demurrer to Answer.
4. Order Overruling Demurrer to Answer in Part and Sustaining Same in Part.
5. Reply.
6. Verdict.
7. Judgment.
8. Motion for New Trial.
9. Memorandum Decision on Motion for New Trial.
10. Order Denying Motion for New Trial.
11. Bill of Exceptions.
12. Petition for Writ of Error.
13. Order Allowing Writ of Error.
14. Assignment of Errors.

15. Writ of Error and Copy and Proof of Service.
16. Citation and Copy and Proof of Service.
17. Bond.
18. Praecipe for Transcript of Record.

G. E. de STEIGUER,
Attorney for the Defendant.

Indorsed: Praecipe for Transcript of Record. Filed U. S. Circuit Court, Western District of Washington, Aug. 21, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

PACIFIC CREOSOTING COMPANY,
a corporation,
Defendant and Plaintiff in Error.

No. 1826.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, SAM'L D. BRIDGES, Clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify the foregoing 95 printed pages, numbered from 1 to 95, inclusive, to be a full, true and correct copy of so much of the record and proceedings in the above and foregoing entitled cause as is called for by Praecipe of Attorney

for Defendant and Plaintiff in Error, as the same remain of record and on file in the office of the Clerk of said Court, and that the same constitute the return to the annexed Writ of Error.

I further certify that I annex hereto and herewith transmit the Original Writ of Error and Citation.

I further certify that the cost of preparing and certifying the foregoing return to Writ of Error is the sum of $136.10, and that the said sum has been paid to me by G. E. de Steiguer, Esq., Attorney for Defendant and Plaintiff in Error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court at Seattle, in said District, this 20th day of September, A. D. 1911.

SAM'L D. BRIDGES, Clerk.
By B. O. WRIGHT, Deputy Clerk.

No. 2047

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC CREOSOTING COMPANY, a corporation,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

No. 2047.

Brief of Plaintiff in Error

G. E. DE STEIGUER,
Attorney for Plaintiff in Error.
618 New York Block.
Seattle, Washington.

The Ivy Press, Third and Cherry, Seattle

No. 2047

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC CREOSOTING COMPANY, a corporation, *Plaintiff in Error,* vs. UNITED STATES OF AMERICA, *Defendant in Error.*	No. 2047.

Brief of Plaintiff in Error

G. E. DE STEIGUER,
Attorney for Plaintiff in Error.
618 New York Block.
Seattle, Washington.

In the
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC CREOSOTING COMPANY, a corporation, *Plaintiff in Error,* vs. UNITED STATES OF AMERICA, *Defendant in Error.*	No. 2047.

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

On August 3, 1908, the Pacific Creosoting Company, by the ship "Oanfa," imported into the United States and entered at the custom house at Tacoma 2,181 iron drums containing creosote, and on August 29, 1908, by the ship "Bellerophon," imported into the United States and entered at the custom house at Tacoma 1,000 steel drums and 482 steel barrels containing creosote (Transcript, pages 2 and 3, and Exhibits "A" and "B").

It is admitted that the creosote contained in these drums and barrels was not subject to duty. It was

shown by the testimony of Special Deputy Collector Blackwood (Transcript, pages 45 and 46) that prior to the entries in question, drums and barrels of the character referred to had been repeatedly imported and all admitted free. The first assessment of duty on such drums or barrels was in November following the importations involved in this case.

In both of the entries involved in this case the importer entered them as free (Exhibits "A" and "B").

Each shipment was examined, a certificate made that the goods were as described and a permit given for their delivery, signed by the examiner and by the deputy collector (Defendant's Exhibits 1 and 2, Transcript pages 73 and 74).

These two permits differ in this particular: In the permit for the delivery of the goods imported on the "Oanfa," the goods are designated as free goods and stated to be exempt from duty by law. In the permit for the delivery of the goods imported on the "Bellerophon" they are termed dutiable goods, and it is recited that the duties have been paid or secured.

From the testimony of the witnesses for the Government, Fairweather and Blackwood, both deputy

collectors, it appears that the merchandise covered by these two permits was entered by the importer as being free of duty and that no importance is to be attached to the heading of the permit. It appears by each permit that the government had no further claim on the goods for duty.

Deputy Blackwood further testified (Transcript, page 44): "These permits were presented by the broker, who filed the entries at the customs house, and as they were not regarded as seriously in conflict with his tentative classification 'free of duty,' they were accepted. I don't attach any significance to the heading of the permit."

By the testimony of Stevens (Transcript, pages 38 and 41) and White (Transcript, page 39), it appears that no demand for payment, claim for duty, or request for security therefor was made until November, 1909, about fifteen months after the delivery of the goods.

Each importation was delivered on or within a few days after the date of entry.

The determination as to duties on these importations having been apparently concluded, thereafter certain similar goods were imported on which, in November, 1908, a liquidation of duties was ordered

(Transcript, page 46). As to the importations involved in this case, however, nothing further was done until the 26th day of October, 1909, at which date F. C. Harper, collector of the port, sent a letter to the secretary of the treasury, stating that the board of appraisers had decided that iron drums are unusual coverings for creosote oil and asking advice concerning the entries in question, as to whether they should be classified and liquidated in accordance with such decision. In this letter the following statement was made:

"The question also arises whether there is any limitation upon the liquidation of these entries, the goods having been entered and passed free of duty more than one year ago (Art. 1065, C. R. 1908), although this office is inclined to the opinion that the limitation does not begin to run until after the liquidation of the entries."

What, if any, answer was made to this letter is not disclosed, but on or about November 27, 1909, an attempt was made to liquidate the duties on the goods imported, those on the "Oanfa" being liquidated at $6,567.30 and those imported on the "Bellerophon" being liquidated at $4,462.65.

No question is made as to the notice or form of liquidation, the ground of objection of the plaintiff in error to such liquidation being that the goods had

been passed free of duty more than one year prior thereto and that therefore such action was final and conclusive as between the Government and the plaintiff in error.

The foregoing seem to be the essential facts of the case. As side lights thereon, however, we refer to the following testimony of various deputy collectors:

TESTIMONY OF CAPTAIN PLUM (Transcript, page 22).

Q. Is it the practice to release goods if they are dutiable, without any payment of duty whatsoever, and without any security?

A. It is not the practice, no, sir.

TESTIMONY OF CAPT. PLUM (Transcript, page 24).

Q. Now, what was the practice at a sub-port where the examining officer estimates the importation to be free of duty—what is the practice as to delivery?

A. Well, if the merchandise is free by law, delivery is made.

Q. Well, if he estimates it to be free of duty at the sub-port, then he delivers it?

A. Yes, sir, in that case, yes, sir.

TESTIMONY OF CAPT. PLUM (Transcript, page 24).

Q. Well, if the officer having the matter in charge holds them dutiable, he holds them?

A. If he deemed them dutiable and knew them to be dutiable he would hold them, yes.

As indicating the authority for and effect of the

permits for delivery of the merchandise in question we quote from Customs Regulations, Article 218:

"Every invoice, as soon as the merchandise is entered, shall be stamped with the date of the entry and certified by the collector, or his deputy, and the officers, whose duty it is, will compare the classification made in the entry with the description given in the invoice, and will see that the merchandise is classified at the rates provided by law. * * * The duties shall be estimated on the invoice and entered value, the invoice certified and a permit for delivery filled out * * *."

From this it will be seen that the law contemplates that the revenue officers shall, before giving their permit for delivery, see that the merchandise is classified in accordance with law.

And also from Article 220:

"The amount of estimated duties having been registered with the naval officer and deposited with the cashier, a permit on form Catalogue No. 584 to land the goods shall be signed by the collector and countersigned by the naval officer. * * *"

From this last article it appears that a deposit of money equal to the estimated duty is a prerequisite of the permit for landing the goods.

These two articles are cited for the purpose of showing that under the regulations in question the permits for landing are based on the estimation of

duties (or absence of duties) by the revenue officers; that they show their findings as to the character of the goods as free or dutiable and show that the government has no further claim against the goods for duty.

The action with regard to these importations was taken by the examiner and the deputy collector at Tacoma. With reference to the authority of the deputy, we refer to Section 2 of the Act of Congress approved August 28, 1890, 26 United Statutes at large, page 363, found at page 958 of Pierce's Federal Code, wherein it is stated that "subject to the supervision of the collector of customs at Port Townsend, the deputy collector at each of said ports is hereby authorized * * * to perform the functions prescribed by law for collectors of customs."

In addition, as to the authority exercised by the deputy, we call the attention of the court to the testimony of the witness Fairweather (Transcript, page 36), wherein he states that it is the practice to release goods on the report of the deputy collector.

As it may be necessary to anticipate some of the contentions of the defendant in error, reference is made to the following points in the evidence:

Wilkinson, a witness for the government (Transcript, page 27), testified as to the record that is made

as to matters of liquidation and, in particular, testified that there is a column for estimated duty.

While the testimony of this witness is that this estimated duty is merely the statement of the importer, it clearly appears by Article 218 of Customs Regulations heretofore cited that it is or should be the estimate of the officers.

By the testimony of the same witness it appears that when goods are passed free of duty, no further entry is made, except that there is nothing placed in the column of "estimated duty" (Transcript, page 27).

While this witness states that, where the final action is to pass goods free, the words "as entered" are placed in the "liquidated" column (Transcript, page 33), he testifies (Transcript, pages 31 and 32) that formerly they used a stamp in this column with the words "free as entered by the importer," which stamping was discontinued seven or eight or ten years ago, and later simply a line was drawn through the space.

Taking all of this testimony together, it is fairly shown that at the date of these importations, where goods were passed free of duty, no affirmative entry was made thereof, but a blank was left in the column of estimated duties.

This is further substantiated by the testimony of the same witness (Transcript, page 28), as follows:

Q. Mr. Wilkinson, when, in the column of "Estimated Duty" there appears only a blank, what does that mean?

A. It means the goods were free of duty, or supposed to be at the time the entry was made.

During the course of the trial the court, over defendant's objections, admitted evidence as follows:

A—Testimony of Henry Blackwood (Transcript, page 43): "Action of the office as to classification of these invoices was suspended."

The objection was made that said statement was a mere legal conclusion, and if the action was taken it was only provable by some record of the collector's office.

B—Testimony of Henry Blackwood (Transcript, page 44), as follows: "He (the collector) concluded to classify the next importation of steel drums containing creosote as an unusual covering, the steel drum taking the rate of duty of forty-five per cent, and continued to suspend action as to classification of these two importations pending the result of the decision of the general board of appraisers."

The objection to this evidence was that it was merely a conclusion of law and that if the collector reached such a conclusion there should be some record of it.

When all the evidence was in, the Government moved for a peremptory instruction in its favor, and the defendant below also moved for a peremptory instruction in its favor. The court granted the motion of the Government and ordered the jury to return a verdict in the sum of $12,077.62 (on which judgment was thereafter entered) and denied the motion of the defendant.

Specifications of Error.

1. The court erred in directing the jury to render a verdict in favor of the plaintiff below.

2. The court erred in not directing a verdict in favor of the defendant below. As there can be no question as to the effect of the instructions and the refusal to instruct, and as they are both shown in full on pages 52 and 53 of the transcript, it is deemed unnecessary to set forth the full text.

3. There were various objections made and exceptions taken to the ruling of the trial court on the admission of evidence:

(a) Objections to the admission of the protests filed by the defendant below against the purported liquidations.

It is assumed that these protests were introduced as indicating that the defendant, by referring to a liquidation, was estopped from disputing that a liquidation was made. It is unquestionable that the defendant, being required to make any objection to the liquidation within a certain time, may file a protest thereto without waiving its right to question the propriety of any liquidation whatsoever being made. This seems so evident, and furthermore, in view of the fact that the question seems settled by the case of *Beard vs. Porter*, 124 U. S. 437, 442, no further argument will be made on this matter.

(b) Objections to the testimony of the witness Henry Blackwood, as follows:

"Action of the officer as to classification of these invoices was suspended."

For the reason that the statement was a mere legal conclusion, and that, if true, it is only provable by some record of the collector's office.

(c) Objections to the testimony of the witness Blackwood that the collector "concluded to classify the next importations of steel drums containing creosote as an unusual covering, the steel drum taking the rate of duty of forty-five per cent, and continued to suspend action as to classification of these two im-

portations pending the result of the decision of the general board of appraisers, in case protest was filed by the importer upon the importation classified as dutiable," for the reason that said statement was a mere conclusion of law and only provable by the records of the collector's office.

(d) Objections to the testimony of the witness Blackwood in explanation of a letter of the collector for the Port of Puget Sound, which testimony was as follows:

MR. TODD: Just let me ask the question. Calling your attention to this language in the letter: "The question also arises whether there is any limitation on the liquidation of these entries, the goods having been entered and been passed free of duty more than one year ago." What does that refer to?

MR. DE STEIGUER: We object—that is the letter of the collector at Port Townsend, and signed by him.

THE COURT: If he has any explanation to make, he may do so.

Defendant excepts—exception allowed.

A. That clause, read in connection with the remainder of the letter, means the goods had been delivered to the importer more than a year prior to the date of the letter.

ARGUMENT.

The principal points of this case are as follows:

(a) Should the court have ordered a verdict in favor of the plaintiff?

(b) Should not the court have ordered a verdict in favor of the defendant?

(c) If the evidence would permit a verdict in favor of either party, should not the court have submitted the cause to the jury?

As to the various objections to the introduction of evidence, they were taken principally to prevent the defendant, in the absence of such objections, being bound by the evidence so introduced. The statement of the case shows that the evidence given over such objections amounted practically to legal conclusions or to a construction of written documents which were too plain to require construction or as to which the testimony of the witness could be of no assistance to the court or the jury. No detailed argument will be made as to the admission of evidence, but we ask the court to consider its effect (or lack of effect) in determining whether the lower court erred or did not err in its ruling upon the request for peremptory instructions.

The defense in this case was based upon a special statute of limitations, which is as follows:

"That whenever any goods, wares and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares and merchandise shall have been liquidated and paid, and such goods, wares and merchandise shall have been delivered to the owner, importer, agent or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent or consignee, be final and conclusive upon all parties." (18 St. L. 186, Pierce's Federal Code, Section 5553.)

From this statute it clearly appears that where merchandise has been imported and delivered to the owner or importer, the action of the collection officers of the government is final and conclusive upon all parties after the expiration of one year from the date of entry in either of the two following cases:

First. When the merchandise has been entered and passed free of duty.

Second. When the duties upon merchandise have been liquidated and paid.

(In making this statement no reference is made to the question of fraud or protest, because they are not pertinent to this case.)

There is a clear distinction in the statute—a distinction based upon a very obvious reason—between passing goods free of duty and liquidating duties upon goods.

The term liquidation is applicable only where it is recognized that duties are to be assessed. The term "passing free of duty" is applied to goods which are assumed not to be dutiable.

Attention is called to this very obvious distinction, because there seems to be some confusion in the testimony of the revenue officers with reference thereto.

It is clear that the action of the officials in the liquidation of duties upon the one hand or in passing the goods free of duty on the other, is conclusive upon the government after the expiration of one year.

Beard vs. Porter, 124 U. S. 437.

United States vs. Leng, 18 Fed. 15.

Cassell vs. United States, 146 Fed. 146.

United States vs. Frazer, 25 Fed. Cases, page 1207.

The case of *Abner Doble Co. vs. United States*, 119 Fed. 152, is not in conflict with these views.

In the case cited it was recognized that the goods were subject to duty; no final liquidation of the

amount was made until shortly after withdrawal, when it was ascertained by final liquidation that there was a small balance owing to the government.

The Circuit Court, in granting the peremptory instructions to the jury based its decision upon this case (Transcript, page 52), using the following language:

"I think I must yield to the law as decided by the Circuit Court of Appeals for this circuit. In the course of Judge Gilbert's opinion he says:

" 'The law does not prescribe the time when the collector shall liquidate a duty. He may liquidate before, or a year after, entry. The only limitation upon his action in that regard is, that after once liquidating, he may not, in the absence of fraud or protest by the owner, importer, agent or consignee, reliquidate after a year from the date of entry.' "

In the case where the Circuit Court of Appeals used this language, it is apparent that there were duties which had not been liquidated. In the present case the contention is that the goods had been passed free of duty more than one year before the attempted liquidation.

We submit that the language used by the Circuit Court of Appeals is not applicable to this case.

The whole question, therefore, is *whether the goods in question were passed free of duty more than*

one year before the attempted liquidation. There is no question as to the dates, and therefore the only question is as to the effect of the action of the collecting officers.

From the summary of the evidence heretofore given, the following facts appear practically undisputed:

1. For years previous to the entries in question, similar goods had been admitted free at the Port of Puget Sound.

2. Pursuant to this custom the importer entered these goods as free.

3. The goods were duly examined, and a permit for the delivery thereof given. As to one shipment, the goods were clearly recognized as free goods; as to the other and later shipment, owing to a clerical error, they were classified as dutiable goods on which duties had been paid or secured.

4. No payment of duties or security therefor was demanded, but the goods, pursuant to the permit, were delivered to the importer.

5. For about fourteen months after the importations no steps whatsoever were taken in the way of claiming duties.

6. Thereafter the Board of United States General Appraisers decided that similar merchandise was dutiable, and thereafter, on October 26, 1909, the collector at Port Townsend called the attention of the secretary of the treasury to this decision; asked his advice as to whether the board's decision should be treated as retroactive, and stated as to the goods involved in this action that they had *"been entered and passed free of duty more than one year ago."* Thereafter the attempted liquidation involved in this action was made.

If there is any possible way in which officers of the government can so act that they shall be construed as having passed goods free of duty, they did so in these cases.

The acceptance of the entries and giving of the permits with the indorsements set forth; their testimony upon the stand showing that they recognized that the character of the goods was not substantially in conflict with the entries; their failure to make any demand for the duties or for security therefor; the communication to the secretary of the treasury, prepared by one of the deputies and signed by the collector; all show unquestionably—and in the case of the letter last referred to, state literally—that the

goods had been entered and passed free of duty more than one year before the attempted liquidation.

If this court is of the opinion that the trial court erred in its instructions, the question arises as to what disposition of the case shall be made by this court.

If the court, in view of Section 914, U. S. Revised Statutes, and the rule laid down by it in *Russo-Chinese Bank vs. National Bank of Commerce*, 187 Fed. 80, 86, follows the practice of the state court, we ask for an order that judgment be entered in favor of the defendant.

The state rule of practice on this point is found in *Roe vs. Standard Furniture Company*, 41 Wash. 546, 550.

If in the opinion of the court such order, notwithstanding the state practice, is not consistent with the federal practice, we ask that the judgment of the lower court be reversed and a new trial granted.

Respectfully submitted,

GEORGE E. DE STEIGUER,
Attorney for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

PACIFIC CREOSOTING COMPANY,
a corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 2047

Upon Writ of Error to the United States District Court for the Western District of Washington Northern Division

Brief of Defendant In Error

ELMER E. TODD,
United States Attorney

SMILEY L. & P. CO. 72 COL. ST. SEATTLE

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

PACIFIC CREOSOTING COMPANY, a corporation, *Plaintiff in Error,* vs. UNITED STATES OF AMERICA, *Defendant in Error.*	No. 2047

Upon Writ of Error to the United States District Court for the Western District of Washington Northern Division.

Brief of Defendant In Error

ARGUMENT.

The only question in this case is whether there was any evidence to go to the jury on the issue framed by the defendant's affirmative defenses

and the reply of the plaintiff thereto. To the first cause of action the defendant pleaded the following affirmative defense:

"That more than one year prior to November 27, 1909, and more than one year prior to the alleged and attempted liquidation referred to in Paragraph II of said alleged first cause of action, said drums were entered and were passed free of duty by the Collector of Customs for the District of Puget Sound and delivered to this defendant, being the owner and the importer thereof."

To the second cause of action the defendant pleaded the same defense in substantially the same language.

In its reply the plaintiff denied that more than one year prior to November 27, 1909, and more than one year prior to the liquidation referred to in Paragraph II of the complaint, or at any time, said merchandise was passed free of duty by the Collector of Customs for the District of Puget Sound.

The contention of the Government is that the merchandise in question was never passed free of duty by the Collector of Customs; that to constitute such a passage free of duty there must be some action taken by the Collector in which he finally as-

certains the duties, or finally ascertains that the goods are free of duty.

In this case the Collector did not make this final ascertainment until November 27, 1909. Every step taken by him in the completion of the liquidation of this entry and the final ascertainment that the goods were dutiable was in accordance with the provisions of the Customs Regulations.

Two copies of the statement forms of entry were sent from the sub-port of Tacoma to the Collector's office at Port Townsend. Thereupon the completion of the liquidation was suspended waiting a decision of the Board of Geenral Appraisers upon like entries. That decision having been rendered, these entries were liquidated and each entry was stamped with the word "liquidated" and the date, November 27, 1909.

The Customs Regulations prescribe the different steps to be taken and the records to be kept by the Collector of Customs and the Naval Officer in the liquidation of duties. At ports where there is no Naval Officer, the Collector shall solely execute all the duties in which the co-operation of the Naval Officer is requisite. (2622 Revised Statutes). There was no Naval Officer in the Customs

District of Puget Sound. (Record, p. 21).

The Customs Regulations prescribing the method of liquidation, the records to be kept, and providing for the suspension of liquidation of entries, are as follows:

"Art. 1034. Method.—As soon as the appraiser has made his report to the collector of the value, character, and quantity of the merchandise contained in any invoice, and the surveyor has given all the information required of him concerning the weight, gauge, and measurement of the merchandise, the collector shall compare their reports with the invoice and entry, and shall carefully compute the duty upon the basis of such reports. Whenever a new statement of duty is required to be made, it should be noted on the entry in red ink; but if the original statement proves to be correct such statement shall be certified in red ink with the liquidator's initials.

The papers shall then be transmitted to the naval officer, if there be one, and the duty shall be similarly computed by him upon the copy of the entry which was filed in his office, and if in accordance with the collector's statement, the latter shall be certified in red ink with the initials of the liquidator in the naval office. When the papers are returned to the collector with the naval officer's certificate, as above, the entry shall be stamped with the word "liquidated" and with the date of stamping. This stamp becomes the legal evidence

of liquidation, and the right of protest against the assessment of duty must be exercised within ten days rom the date o siuch liquidation. Notice of the liquidation shall on the date thereof be conspicuously posted in the collector's office for the informtaion of the importers.

Duty shall not be assessed in any case upon an amount less than the invoice or entered value."

"Art. 1037. Record of liquidations.—A daily record shall be kept by the collector of all entries liquidated, stating the name of the vessel, port of departure, date of arrival, name of importer, and serial number and date of entry. A daily record must also be kept by both the collector and the naval officer of all duties, additional and regular, due upon liquidation, and notice of such liquidation be promptly sent to the parties in interest. If within ten days thereafter such duties shall not have been paid, the collector may, in his discretion, cause an investigation to be made to ascertain the whereabouts of such parties, and if they cannot be found, or are dead leaving no estate, or are insolvent, he shall report the facts to the Solicitor of the Treasury, who may authorize the collector to treat such cases as uncollectable, without prejudice, however, to the right of action on the part of the Government. It shall be the duty of the collector to keep a record of all such cases and from time to time make such efforts as may be possible to collect such duties. In all other cases after said ten days the district attorney shall be instructed to proceed for the recovery of such duties."

"Art. 1066. Suspension of liquidation.—Exceptions.—Where entry has been made, and the case suspended without liquidation more than one year, such entries may be liquidated, and additional duties collected, or refunds may be made.

"The statute of limitations applies only to free goods and to cases where the duties have been liquidated and paid and the merchandise delivered to the importer. If there is a liquidation of any suspended case after the termination of one year, in the absence of protest and appeal, such liquidation must be regarded as final. The date of the limitation, in all cases covered by the statute, is from the entry for consumption or warehouse, as the case may be."

It is the practice in the District of Puget Sound to send two copies of the statement form of entry from the sub-port to the Collector's office at Port Townsend, and when the entry is liquidated, to stamp each of these two copies with the official stamp of liquidation, and the date thereof, and send one copy to the Auditor of the Treasury Department, and keep the other in the records of the Collector's office at Port Townsend.

Monthly reports of liquidations are sent to the Auditor of the Treasury Department. When the liquidation of an entry is suspended in place of the copy of the entry being sent to the Auditor, pin's

slips are sent in reporting the reason of suspension. (Record, pp. 28-30).

In the case of these two entries, the usual two copies of statement form of entries were sent from the sub-port of Tacoma to the Collector's office, and when the entries were liquidated, Nov. 27, 1909, were stamped with the official stamp and date of liquidation. (Plaintiff's exhibits A and B). These entries were in the meantime suspended and pink slips showing that they were suspended were sent to the Auditor of the Treasury Department. (Plaintiff's exhibit "C"). The reason given why the entries were not forwarded, was because they were "waiting completion."

Henry Blackwood testified the "action of the office as to classification of these invoices was suspended." (Record, p. 3).

Error is urged by the plaintiff in error to the admission of this evidence, on the ground that it is a legal conclusion of law, but clearly the objection is untenable. The question is clearly one of fact and the evidence was properly admitted.

All entries of merchandise for the District of Puget Sound are liquidated at the Collector's office at Port Townsend (Record, pp. 18 and 19). Where

the goods have been estimated as "free of duty" by the Deputy Collector of the sub-port, the entry is liquidated at the Collector's office in the same manner as if the goods had been estimated "dutiable." If upon liquidation the goods are found to be free from duty, under the column of "liquidating duty," are placed the words, "as entered." (Record, p. 27). In this record is also a column entitled, "Date of Liquidation."

From the testimony of Charles Wilkinson, Deputy Collector and Clerk in the Collector's office at Port Townsend, who kept the record of liquidations, it appears that the record shows each of these entries were liquidated November 27, 1909, and that in the column "Liquidated Duty," as to the first entry appeared the amount $6,567.30, and as to the second entry liquidated, amount of $4,462.-65. (Record, pp. 27 and 28). The entries themselves (Plaintiff's exhibits A and B) show stamped upon them the increased duty and the date of liquidation November 27, 1909, in accordance with Article 1034 of the Customs Regulations. It therefore appears that these entries were not liquidated until November 27, 1909, by the Collector of Customs, at which time it was ascertained that the

goods were not free of duty, but were subject to duty in the amounts indicated.

The contention of the Plaintiff in Error seems to be that the mere delivery of the goods by the Deputy Collector upon his estimate that they were free of duty, is a passing free of duty within the meaning of Section 21 of the Act of June 22, 1874. This position is not tenable, because it is the Collector who finally ascertains the duties, and it is his decision which is final. Until the Collector has acted, the entry is not completed.

This Court, in the case of *Abner Doble Co. vs. United States*, 119 Fed. 152, said:

"The law does not prescribe the time when the Collector shall liquidate the duties. He may liquidate before or after a year from entry. The only limitation upon his action in that regard is that, after once liquidating, he may not, in the absence of fraud or protest by the owner, importer, agent, or consignee, reliquidate after a year from the date of entry."

U. S. vs. De Rivera, 73 Fed. 679, and *Gandolfi vs. U. S.*, 20 C. C. A. 652, 74 Fed. 549 were cited.

In the *DeRivera* case, the merchandise had been entered and delivered to the importers in 1881.

at which time they paid the estimated amount of duty. The entry was not liquidated until 1890. The defendants in that case claimed that the delivery to them constituted a liquidation, but the Circuit Court of Appeals held that liquidation was not complete until the Collector himself had acted.

In the *Gandolfi* case the merchandise was entered in November, 1891, and delivered to the defendants in December, 1891, but the duty was not liquidated until March, 1893. The Court said:

"This statute, in effect, provides that, when the collector has once liquidated the duties, he may not reliquidate them after a year from entry, where there is no fraud and there has been no protest. If the liquidation of the entry on March 7, 1893, which was proved in the case, was in fact a reliquidation, it would be within the prohibition of this statute. But there is nothing in the case to show that the duties were ever liquidated before March 7, 1893. There is no proof of any "final ascertainment and liquidation of the duties" by the collector, nor any 'stamping of such ascertainment and liquidation upon the entry,' earlier than March 7, 1893; and these are the acts which constitute a liquidation under the statutes. *Davies vs. Miller*, 130 U. S. 289, 9 Sup. Ct. 560."

There can be no distinction between the case where the estimated duties are paid and the goods

delivered, and a case such as the one at bar, where the goods are estimated free of duty and the goods delivered. In neither case is the transaction completed until the Collector himslf has acted. The Collector in this case did not act until November 27, 1909. This is proved by the stamp upon each entry. (Plaintiff's exhibits A and B), and by the record of liquidations in the Collector's office (Record, pp. 26-28). The liquidation was suspended as is shown by the testimony of Charles Wilkinson (Record, pp. 28-31), by the testimony of Henry Blackwood (Record, p. 43), and also by the pink slips (Plaintiff's exhibit "C," (Record pp. 65-57).

When these entries were liquidated it was the original liquidation, and not a reliquidation. Plaintiff's exhibit "D," which is the notice of the liquidation of these entries and others, posted at the Custom House in Tacoma in accordance with Article 1054, Customs Regulations, shows this, and also the protests of the importer (Plaintiff's exhibits E and F), admit a liquidation, and not a reliquidation.

The letter of the Collector of October 26, 1909, relied on by the Plaintiff in Error uses the following language:

"The goods having been entered and passed free of duty more than a year ago."

The letter, however, shows that there has been no final ascertainment by the Collector of the dutiability of the goods and that the entry had never been liquidated. The language used by the letter did not mean that the Collector had finally acted, but was used in the sense that the goods had been estimated free and delivered to the importer at the sub-port of entry, not that they had been entered and passed free of duty by the final action of the Collector.

It will be noticed that the issue as framed by the affirmative defenses in the answer and by the reply, is whether the goods were passed free of duty by the Collector of Customs for the District of Puget Sound. As before argued, the transaction could not be complete without action by the Collector himself.

With reference to the authority of the Deputy Collector at Tacoma, the statute cited by Plaintiff in Error, only gives the Deputy Collector the usual powers of Deputy Collector, which are subject to the supervision of the Collector of Customs at Port

Townsend. It does not make the action of the Deputy Collector final. The delivery of the goods by the Collector himself would not have been a final ascertainment of the duties. The final ascertainment must be made in accordance with the Customs Regulations and the steps therein prescribed must be followed and the records provided for must be kept.

There is absolutely no evidence in the case showing that the Collector, however, took any action finally ascertaining these goods to be free of duty. In the absence of any such proof, the affirmative defenses pleaded were not sustained and the court properly directed a verdict for the plaintiff.

The judgment of the lower court should be affirmed.

Respectfully submitted,

ELMER E. TODD,

United States Attorney.